No. 06-

IN THE

Supreme Court of the United States

THE HONORABLE RICHARD B. SANDERS,

Petitioner,

v.

THE WASHINGTON STATE
COMMISSION ON JUDICIAL CONDUCT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a judge's right to due process violated when he is disciplined based on a vague standard of the "appearance of impropriety," even after he is exonerated of any actual impropriety or violation of specific provisions of the Code of Judicial Conduct?

2. Are Canons 1 and 2A of the Washington Code of Judicial Conduct (the "CJC") unconstitutionally void for vagueness?

3. Are a judge's First Amendment rights violated when he is disciplined for meeting with and discussing with the public an issue of public concern and there is no finding he engaged in any improper ex parte communication?

4. Does a one-tier judicial disciplinary system violate due process when it combines the investigatory, prosecutorial, and adjudicatory functions into a single body without erecting walls between the different functions?

5. Does due process require a one-tier judicial disciplinary body to allow an accused judge to discover information the disciplinary body received prior to filing formal charges against the judge in order to confront that information at trial or to determine if any of the adjudicators are biased against him?

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OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported at 159 Wn.2d 517, 145 P.3d 1208. It is reprinted at Appendix A. The order of the Supreme Court of Washington, denying Justice Sanders' motion for reconsideration, is unreported and reprinted at Appendix E. The relevant orders and decision of the Washington Commission on Judicial Conduct are unreported and are reprinted at Appendices B, C, and D.

JURISDICTION

The Supreme Court of Washington rendered its opinion in this case on October 26, 2006. A timely motion for reconsideration was denied, and a declaration of finality entered, on March 7, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. Am. I.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Am. V.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Am. XIV.

Washington Code of Judicial Conduct Provisions

Canon 1: Judges Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective. Washington State Code of Judicial Conduct Canon 1.

Canon 2: Judges Should Avoid Impropriety and the Appearance of Impropriety in All Their Activities.

(A) Judges should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Washington State Code of Judicial Conduct Canon 2(A).

Washington Commission on Judicial Conduct Procedural Rules

The statement of charges alleging misconduct or incapacity shall be available for public inspection. Investigative files and records shall not be disclosed unless they formed the basis for probable cause. Those records of the initial proceeding that were the basis of

a finding of probable cause shall become public as of the date of the fact-finding hearing. CJCRP 11(b)(2).

After initial proceedings, the commission shall: . . . (C) Find that probable cause exists that respondent has violated a rule of judicial conduct or may be suffering from an incapacity that seriously interferes with the performance of judicial duties and is permanent or likely to become permanent. Upon such a finding of probable cause, the commission shall identify the records of the initial proceedings that are the basis for the finding and order the service and filing of a statement of charges. The commission shall also identify those materials and information within the commission's knowledge which tend to negate the determination of the commission. CJCRP 17(d)(4)(C).

Required disclosure. Within fourteen days after the filing of the answer, disciplinary counsel shall disclose to respondent or respondent's lawyer the records identified by the commission pursuant to Rule 17(d)(4)(C), unless otherwise provided by commission protective order. CJCRP 22(a)(1).

The taking of depositions, the requests for admissions, and all other discovery procedures authorized by Rules 26 through 37 of the Superior Court Civil Rules are available only upon stipulation or prior permission of the presiding officer upon a showing of good cause. CJCRP 22(b)(1).

STATEMENT OF THE CASE

The citizens of Washington elected Richard B. Sanders a Washington Supreme Court justice in November 1995. He has been reelected to consecutive terms, and is currently serving. In March 2003, the members of the court were invited to visit the McNeil Island Special Commitment Center (the "Center"), which houses sexually violent predators. Judges are encouraged to participate in such visits, and earn continuing legal education credits for doing so, as Justice Sanders did here. The Washington

State Commission on Judicial Conduct (the "Commission") and the Washington Supreme Court nonetheless sanctioned Justice Sanders because he associated and spoke with Center residents during his visit.

After receiving the invitation, Justice Sanders contacted the Center superintendent to make arrangements for a tour. He notified the other justices of those arrangements. Justice Sanders toured the Center. Before visiting the Center, he made the following request of the Center superintendent by letter dated January 23, 2003:

> Please advise the residents that it is not my role to factually investigate particular legal circumstances of any individual and that discussion of same might be grounds to seek my recusal in any pending or future proceeding. That would be my only ground rule and should any discussion lead in that direction I will reiterate what I just said.
>
> Although I have received correspondence from some of the residents regarding the upcoming tour, that correspondence was neither solicited or responded to . . . . If there are any particular legal problems, however, they must be dealt with fairly and impartially in the context of appropriate litigation upon which this tour shall and must have no influence whatsoever.

During his visit, Center staff placed Justice Sanders in a conference room where he met with groups of residents. Before beginning any of those meetings, Justice Sanders warned the residents that he could not talk with them about their personal legal circumstances because to do so might prevent him from hearing future matters. Periodically thereafter, Justice Sanders repeated these limitations to the residents.

Justice Sanders began the meetings by requesting that the residents tell him about their respective criminal records and treatment experiences at the Center. During his discussions with one group of residents, Justice Sanders asked some of the residents whether they believed they personally had the ability

to control their sexual urges.[1] Justice Sanders did not solicit or offer any opinion on any legal issue, nor did he indicate how he might vote in any case.

At the time Justice Sanders visited the Center, the Washington Supreme Court was considering *In re Detention of Thorell,* 149 Wn.2d 724, 72 P.3d 708 (2003). Drafts of both a majority opinion and a dissent by Justice Sanders were circulating among the justices. *Thorell* was a sexual predator commitment case involving six petitioners, including at least one of the Center residents with whom Justice Sanders met. The court was considering, in light of this Court's decision in *Kansas v. Crane,* 534 U.S. 407 (2002), whether the determination that a sexually violent predator lacks behavioral control must be found separately by the jury, based upon a jury instruction. *Thorell,* 72 P.3d at 713. This issue was not discussed with residents or staff during Justice Sanders' visit. After his visit, and by request of the prosecutors in *Thorell,* Justice Sanders recused himself from any further proceedings in that case.

The primary staff person at the Center assigned to Justice Sanders' visit was Alan McLaughlin. Prior to the visit, McLaughlin discussed the visit with an assistant attorney general and a county deputy prosecutor, who both handle sexual predator cases. They instructed McLaughlin to make notes of the visit. He had never before memorialized any tour. McLaughlin reported back to the Attorney General and King County Prosecutor's Offices. Representatives from the King County and Snohomish County Prosecutors Offices filed a complaint with the Commission on March 16, 2003, accusing Justice Sanders of violating the Washington Code of Judicial Conduct ("CJC").

The Commission operates a "one-tier" judicial disciplinary system, blending the investigative and adjudicatory functions into a single body.[2] Commission members interact with and

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[1] "Volitional control" is an issue relating to the commitment, confinement, and treatment of sexually violent predators.

[2] The Commission is comprised of eleven members: six non-attorney citizens, two lawyers, and three judges.

receive information from investigatory staff and disciplinary counsel before formal charges are filed. After charges are filed, staff members are no longer supposed to have ex parte communications with Commission members.[3] As happened in this case, prior to the filing of formal charges the Commission receives and considers various documents supplied by staff, including press articles. Commission procedures do not permit an accused judge to obtain copies of all the materials the Commission receives, and may consider, prior to the filing of formal charges.[4] CJC Rule 11(b)(2) provides that: "Investigative files and records shall not be disclosed unless they formed the basis of probable cause." The Commission determines what portion of the record forms the basis for a finding of probable cause and makes that information public at the time of hearing. CJC Rule 17(d)(4)(c). Justice Sanders sought to discover information the Commission considered in his case, so that he could respond to it. He also wanted to determine whether any Commission member should be challenged for bias.[5] His discovery requests were denied.[6]

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[3] The record indicates the Commission may have received information from staff about this case after formal charges were filed, however, the nature of this information is not of record since Justice Sanders' request for discovery on this issue was denied.

[4] CJC Rule 11(b)(2) provides that: "Investigative files and records shall not be disclosed unless they formed the basis of probable cause." The Commission determines what portion of the record forms the basis for a finding of probable cause and makes that information public at the time of hearing. CJC Rule 17(d)(4)(c).

[5] Justice Sanders challenged the Commission's impartiality. His challenge was denied, although one member of the Commission did recuse on other grounds raised by Justice Sanders.

[6] CJC Rule 22(a)(1) provides the record identified by the Commission as forming the basis of probable cause is to be disclosed to the accused judge. CJC Rule 22(a)(2) requires the Commission and the respondent to disclose the names and addresses of expected witnesses, a summary of the expected testimony, witness statements, and documenting evidence that may be offered. Under CJC 22(b)(1) (Cont'd)

Although the Commission filed formal charges against Justice Sanders five months before he was up for reelection, he was reelected by the voters. The case then proceeded to hearing. Commission members who had participated in the investigatory stage and had determined that probable cause for charges existed, also acted as the adjudicators. The Commission held that the general conversations Justice Sanders had with residents did not violate Canon 3(A)(4) of the CJC, prohibiting ex parte communications.

Nevertheless, the Commission found that Justice Sanders violated Canons 1 and 2(A), because the conversations had the appearance of impropriety. Although there were no impermissible ex parte communications, the Commission determined someone could subjectively believe that something improper occurred. The Commission imposed a sanction of admonishment. The Commission's decision was not unanimous. Four of the eleven members concluded that sanctions were not appropriate.

Justice Sanders appealed to the Washington Supreme Court, which heard the case using justices pro tempore. The standard of review was de novo, both for findings of fact and conclusions of law. The court affirmed the Commission. *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006) (*Sanders II*). Like the Commission, the Washington Supreme Court found that Justice Sanders did not engage in impermissible ex parte contact with residents of the Center under CJC Canon 3(A)(4). Even though Justice Sanders was exonerated of any actual improper ex parte contact under Canon 3(A)(4), the Washington Supreme Court found he violated Canons 1 and 2(A) and upheld the sanction of admonishment. *Id.* at 1211, 1213. On March 7, 2007, the court denied reconsideration, without giving any reasons for its ruling. It did not modify any portion of its earlier decision.

(Cont'd)
depositions are not allowed without the stipulation of disciplinary counsel or order of the presiding officer. Discovery disputes are decided by the Commission and are not appealable prior to the final order.

Justice Sanders raised federal First, Fourth, and Fourteenth Amendment issues in his answer and in his hearing memorandum to the Commission. Appendix F. The Commission did not address the constitutional issues. Justice Sanders specifically preserved these constitutional issues in his notice of contest to the Washington Supreme Court. Appendix G. The briefing in that court by Justice Sanders and by amici discussed the constitutional issues at length. Appendix H, I, J. The Washington Supreme Court touched briefly on some of the constitutional issues but did not analyze them in depth. Appendix A at 6a-11a. The court did not address the First Amendment issues at all.

REASONS FOR GRANTING THE PETITION

A. Summary of Reasons

The Court should grant certiorari to resolve the most important constitutional issues surrounding professional ethics, particularly judicial ethics, and disciplinary procedures. A decision here will resolve decades-long conflicts in case law and commentary, and correct a state court decision inconsistent with this Court's established precedent.

The principal issue in this case is whether a judge who ethically exercises his First Amendment rights can be sanctioned solely because some might subjectively perceive his conduct to be improper. Historically, violating the appearance of impropriety standard has required a concurrent violation of some other provision of the CJC. Here, the Washington Supreme Court ignored years of established jurisprudence by disciplining a sitting supreme court justice for an appearance of impropriety while finding he did not engage in the specific charged misconduct.

The appearance of impropriety standard, standing alone as a basis for discipline, is vague and violates due process. The significance of the Washington court's decision transcends this

case.[7] This issue has been at the center of the debate over ethical standards for lawyers and judges for forty years.[8] The vast majority of judges in the United States serve in state court or administrative systems subject to the CJC. In February 2007, the American Bar Association (the "ABA") adopted a revised Model Code of Judicial Conduct (the "Model CJC"). The new Code contains an expanded version of the appearance of impropriety standard, and transforms it from a hortatory standard into a rule that is the basis for discipline.[9] If past is prologue, almost all states will adopt it. Before other judges are trapped by the vagaries of a questionable "appearance" standard, and public confidence in the judiciary is eroded by accusations of unethical conduct based upon ill-defined ethics rules, this Court should decide whether the appearance of impropriety standard meets constitutional due process requirements.

This case implicates a sitting, elected judge's First Amendment rights to meet with members of the public and to discuss issues of legal and political importance. Previously, this Court offered guidance on these important First Amendment issues in the campaign context. Most judges have occasion to give speeches or interact with the public to discuss important

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[7] Vague disciplinary standards threaten more than the judiciary. Doctors, CPAs, lawyers, and many other regulated professionals have cause for concern when they may be sanctioned under fuzzy ethics rules that impose discipline based on the specter of negative public perception alone.

[8] *See* Ronald Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 Hofstra L. Rev. 1337 (2006) ("Rotunda").

[9] The former CJC made clear that Canons 1 and 2 were aspirational, not mandatory. ABA, Annotated Model Code of Judicial Conduct 4 (2004). The new Model CJC provides that Canons (where the appearance of impropriety standard was formerly situated) are not enforceable for discipline purposes, only a Rule violation is. Amended Rule 1.2 now provides: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

legal issues. Whether a judge can be disciplined for exercising his First Amendment rights based on a vague disciplinary standard is an issue of utmost importance. In the absence of a ruling from this Court, the only safe course is for a judge to say nothing and meet with no one. The chilling effect on the speech and conduct of America's judges is obvious.

This case also raises important constitutional issues about the structure of most judicial disciplinary bodies. Here, the record suggests the adjudicators may have been involved in some aspects of prosecution as well as investigation and adjudication. Judges, particularly elected judges, have a natural concern about the fairness of disciplinary proceedings and what will happen to their reputations if they are accused of ethical lapses. The Commission's rules and rulings precluded Justice Sanders from ascertaining what information his investigators, and eventual adjudicators, actually received. An accused judge must have the right to learn what his adjudicators have considered inside and outside the formal public proceedings.

These issues have persisted since this Court ruled 30 years ago on the propriety of a one-tier disciplinary system for administrative professionals in the executive branch. Since then numerous states have created judicial disciplinary agencies utilizing this one-tier system. The ABA has rejected as inappropriate the structure utilized by Washington and most other states. This Court has never spoken to whether this model is appropriate for the judicial branch of government. Nor has this Court spoken on what procedural rights an accused judge in such a system has to ensure that it operates fairly and constitutionally. Deciding these important issues is vital to the interests of thousands of dedicated judges.

There are also vital public policy issues at stake. Public confidence in the judiciary requires public confidence in its institutions of accountability. The public must have confidence that those who judge the judges do so fairly and constitutionally. The ethical standards and procedures by which the judiciary is charged and judged go to the heart of judicial independence.

Some, like the Washington Supreme Court in this case, assert in a conclusive manner that the appearance of impropriety standard sets a high benchmark for the conduct of its judges. In reality, it provides those who would undermine respect for the judiciary and its independence a vehicle to do so. As Professor Rotunda recognized:

> Ill defined and fuzzy ethics rules give detractors a green light to hurl too easily the accusation of ethics violations, and over time, this overuse will demean the seriousness of the charge of an ethics violation, or it will demean the judiciary itself.

Rotunda, 34 Hofstra L. Rev. at 1377. The dangers outlined by Professor Rotunda can be avoided if states receive clear guidance from this Court.

B. Canons 1 and 2(A) Contain Broad, Imprecise "Standards" of Conduct

Canon 1 of the Washington CJC provides:

> Judges Shall Uphold the Integrity and Independence of the Judiciary.
>
> An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

The Canon title uses the word "shall," as does the 1990 ABA Model Code.[10] Unlike the drafters of the 1990 ABA Code,

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[10] In 1924, the ABA adopted the first judicial code of ethics entitled the Canons of Judicial Ethics. The Canons remained in place until 1972, when the ABA significantly revised and replaced them. ABA, Annotated Model Code of Judicial Conduct 4 (1972). The 1972 ABA Model Code, which is the basis of the current Washington CJC, primarily used the word "should" in enunciating guidance for judicial conduct. In 1990, (Cont'd)

however, the Washington Supreme Court declined to change "should" to "shall" in the text portion of Canon 1 when it amended the CJC in 1995. Yet even the 1990 ABA drafters who used the mandatory "shall" throughout Canon 1 confessed by "its very general nature [Canon 1] does not establish a bright line for purposes of discipline." ABA, Annotated Model Judicial Code 13 (2004). The Model CJC also states that both Canons 1 and 2 are "aspirational" *id.* at 4, and goes on to note:

> Even those jurisdictions that view the directions of Canon 1 as mandatory have implicitly acknowledged this difficulty by a reluctance to impose discipline solely on the basis of a Canon 1 violation. In most instances, where Canon 1 is cited as a basis for imposing discipline, other Canons are also cited.

Id. at 13.

Both the Commission and the Washington Supreme Court expressly found that Justice Sanders did not violate the specific

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(Cont'd)
the ABA revised the Model CJC. In the time between the two codes, questions and litigation arose concerning the enforceability of various provisions. To help address this problem, the 1990 Code paid particular attention to the use of language to capture the difference between mandatory conduct ("shall") and hortatory conduct to be encouraged ("should"). In 1995, the Washington Supreme Court revised the CJC working with the 1990 Model Code. Yet it never adopted the 1990 code in total. The Washington court retained the structure and format of the then Washington CJC, which was essentially the 1972 ABA Model Code, however, the court extensively amended it, particularly in regard to the use of "should" and "shall." It initially amended the code to make clear that "shall" was mandatory and the basis for discipline, while "should" was hortatory. A few months later, the Washington Supreme Court (before Justice Sanders joined) issued an emergency order striking that terminology. Thus, what is mandatory and what is hortatory is particularly unclear in the Washington CJC, especially since Washington case law in other contexts makes clear the words should be given their plain and ordinary meaning. *State v. Garrett*, 80 Wn. App. 651, 910 P.2d 552, 553 (1996); *Scannell v. City of Seattle*, 97 Wn.2d 701, 648 P.2d 435, 438 (1982).

provision of the Code with which he was charged: Canon 3(A)(4), which prohibits ex parte communications. Prior to this case, there were no Washington cases finding a Canon 1 violation standing alone. In a previous case involving Justice Sanders, the Washington Supreme Court implicitly held that Canon 1 is not independently enforceable for disciplinary purposes. *In re Disciplinary Proceeding Against Sanders,* 135 Wn.2d 175, 955 P.2d 369, 372 (1998) (*Sanders I*).[11] There, the Washington Supreme Court stated that Canon 1 "sets the conceptual framework for constraints on judges." *Id.* That construction comports with the ordinary meaning of the main text of Canon 1 and the structure of the Code: the Preamble notes that the Code consists of "broad statements" called "Canons," and "specific rules" set forth in the Sections under each Canon. The Preamble implies that only specific rules (the Sections under the Canons if mandatory in nature) can form the basis for discipline. The Preamble draws a distinction between mandatory and hortatory language noting: "The use of permissive language in various sections of the Code does not relieve judges from the other requirements of the Code that apply to specific conduct."

Under the Federal Code of Conduct, Canons are not the standard for judicial discipline. Instead, Canons are aspirational goals designed to provide guidance to judges and nominees for judicial office. *See In re Charge of Judicial Misconduct,* 62 F.3d 320 (9th Cir. 1995).

Here, the Washington Supreme Court acknowledges that Canon 1 alone cannot be the basis for discipline and again holds that Canon 1 is merely a "conceptional framework." But it relies upon a violation of Canon 2(A) to provide the "specific" basis for a Code violation. *Sanders II,* 145 P.3d at 1212. This is error, because that Canon is also constitutionally flawed. Canon 2(A) provides "Judges should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

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[11] In *Sanders I,* Justice Sanders was acquitted of all charges by the decision of the Washington Supreme Court.

This provision is the "appearance of impropriety" standard, although that term is only used in the title provision of Canon 2. Canon 2(A) contains two aspects: (1) Judges should respect and comply with the law; and (2) act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. There is no allegation or finding that Justice Sanders failed to respect and comply with the law. The Commission and the court found Justice Sanders violated the second aspect of the Canon 2(A) test, that he failed to act in a manner that "promotes public confidence in the impartiality of the judiciary."[12]

Yet there was no finding that Justice Sanders was not, in fact, impartial.[13] Therefore, the decisions of the Commission and the Washington Supreme Court are entirely predicated upon what someone might *think* about Justice Sanders' visit to the Center. The Washington Supreme Court acknowledged this when it stated: "[T]here was a substantial basis and expectation that Justice Sanders would be in contact with possible litigants . . . and that this contact would be viewed as improper." *Sanders II,* 145 P.3d at 1212.

There is no rule or provision in the CJC that states it is improper for a judge simply to come into contact with possible litigants before the court. *See Smith v. Behr Processing Corp.,* 113 Wn. App. 306, 54 P.3d 665 (2002) (judge not required to recuse himself after realizing he had eaten Easter dinner at the home of a person later appearing before him). If that were the rule, then judges would have to avoid almost all contact with the public, enshrining judicial monasticism as a mandatory standard of conduct.

The Washington Supreme Court attempted to cure the inherently vague appearance of impropriety standard by equating the discipline standard under Canon 2(A) with the standard for

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[12] There are no findings relating to Justice Sanders' integrity, so the only possible issue relates to his alleged impartiality.

[13] See also discussion in Section D, *infra,* as to why the type of impartiality relied upon to convict him is not a compelling state interest.

disqualification:[14] "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the facts.'" *Sanders II*, 145 P.3d at 1212 (quoting *Sherman v. State,* 128 Wn.2d 164, 905 P.2d 355, 378 (1995)).

Defining the standard in that way does not resolve the vagueness problem. Professor Rotunda explains why:

> So what is an "appearance"? Apparently it is something that is not itself an impropriety but appears to be so to "a reasonable person with knowledge of the circumstances." But if this reasonable person *knows what it going on* – the person has "knowledge of the circumstances" – then one would think that he or she would already know whether it really is an impropriety or not.

Rotunda, 34 Hofstra L. Rev. at 1360. Professor Rotunda is correct as the result here demonstrates: although no improper ex parte contact occurred, a reasonable person would conclude that Justice Sanders would not be able to decide cases impartially. This conclusion defies reason, and cannot be the basis for discipline.

The Commission's case and the Washington State Supreme Court's opinion rest on nothing but "appearances." By its nature, the standard of conduct to which Justice Sanders was expected to conform is not objective, it is inherently subjective. No reasonable judge can glean what is and is not prohibited. The "appearance of impropriety" standing alone cannot be a basis for discipline when a judge is found to have acted properly, whether that judge is exercising his First Amendment rights or is simply engaging in a leisure activity such as hunting.

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[14] Justice Sanders recused himself from *Thorell*, and cannot be accused of violating the disqualification rules.

C. The Canons Are Vague Facially and As Applied[15]

As this Court has observed, standards of conduct must be clearly defined if they are to pass constitutional muster:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.

Grayned v. City of Rockford, 408 U.S. 104, 108, (1972). Washington CJC jurisprudence prior to this case followed the same constitutional standard. *In re Disciplinary Proceedings Against Blauvelt,* 115 Wn. 2d 735, 801 P.2d 1235, 1238 (1990) (quoting *American Dog Owners Ass'n v. Yakima,* 113 Wn.2d 213, 777 P.2d 1046, 1047 (1989). A vague state statute offends the Due Process Clause. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).

A statute is vague if (1) it is worded such that it does not notify ordinary persons of the conduct it prohibits, or (2) those charged with enforcement may do so arbitrarily and capriciously. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). In a facial vagueness challenge, allowed in cases where First Amendment freedoms are implicated, the statute is examined with respect to hypothetical citizens and enforcement officers. *See Morales*, 527 U.S. at 56-60. In an as-applied vagueness challenge, the language of the statute is applied to the facts of the case at bar to see if the proscribed conduct is clearly defined so as to provide notice to that specific defendant and guidance for the specific enforcement officers involved. *See Posters 'N' Things, Ltd. v. U.S.*, 511 U.S. 513, 525-26 (1994).

As explained in section D, *infra*, Justice Sanders' First Amendment rights were infringed by this disciplinary action,

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[15] The first threshold for constitutional scrutiny, state action, is not in dispute here. The Commission is a judicial body, a subdivision of the Washington State government.

therefore a facial challenge to the constitutionality of the Canons is allowed. On its face, Canons 1 and 2 fail constitutional scrutiny. They also cannot withstand an as-applied challenge.

This Court held an attorney disciplinary statute void for vagueness as applied in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991). In *Gentile*, a lawyer representing a criminal defendant spoke to the press and claimed that his client was a "scapegoat" for "crooked cops." *Id.* at 1034. He was privately reprimanded under a disciplinary statute prohibiting attorneys from making an extrajudicial statement "if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at 1033. This Court reversed the private reprimand because the rule had a vague caveat: it allowed "general" statements on the nature of the proceeding provided that the attorney did not "elaborate." *Id.* at 1048. Such language is a matter of degree, this Court concluded, and "[t]he lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id.*

In *U.S. v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996), the Ninth Circuit Court of Appeals held that a disciplinary statute exhorting attorneys to "abstain from offensive personality" was facially void for vagueness. The court concluded that the statute could be read to prohibit otherwise constitutionally protected conduct:

> "As 'offensive personality' could refer to any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of the clients' interests, it would be impossible to know when such behavior would be offensive enough to invoke the statute.

Id. at 1119.

Courts that have rejected vagueness challenges to disciplinary codes have done so only when the prohibited conduct was sufficiently specified in subsections of the code. *See, e.g., Halleck v. Berliner*, 427 F. Supp. 1225, 1240 (D.C.D.C. 1977); *Keiser v. Bell*, 332 F. Supp. 608, 613-15 (E.D. Pa. 1971);

Sarisohn v. Appellate Division, Second Dep't, S. Ct. of New York, 265 F. Supp. 455, 458-59 (E.D.N.Y 1967).

As applied here, Canons 1 and 2(A) meet both vagueness tests as enunciated in *Morales, Gentile,* and *Wunsch.* Justice Sanders was not notified of the conduct prohibited by these two canons. He was *absolved* of any improper conduct under the specific provisions of the CJC he was alleged to have violated. Apparently, Justice Sanders was tasked with knowing how others might perceive his actions and refraining from any action, however right and proper, that the public might incorrectly believe offended the impartiality of the judiciary. Yet there is scant evidence that there was any public impression of wrongdoing, particularly given Justice Sanders' subsequent reelection.

Facially, the Canons at issue provide no guidance to an accused judge or the disciplinary body. If the mere potential for public misperception of a judge's behavior is a basis for disciplinary action, then all judges are at risk. No judge can know, based solely on Canons 1 and 2(A), when his or her actions move from proper to improper. If the adjudicator may hypothesize about the public's perception of proper conduct, there is a high danger of arbitrary and capricious enforcement. No judicial enforcement body will have guidance as to when a judge's actions become sanctionable.

D. Disciplining Justice Sanders Here Violates His First Amendment Rights

The guarantee of free speech embodies "our profound national commitment to the free exchange of ideas." *Ashcroft v. Am. Civil Liberties Union,* 535 U.S. 564, 573 (2002) (quoting *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 686 (1989)). Closely associated with the right of free speech are the rights of assembly and association. *DeJonge v. Oregon,* 299 U.S. 353, 364 (1937).

Judges and those seeking judicial office do not surrender these important rights. Candidates have "a First Amendment right to engage in the discussion of public issues and vigorously

and tirelessly to advocate [their] own election." *Buckley v. Valeo,* 424 U.S. 1, 52 (1976); *see also Buckley v. Illinois Judicial Inquiry Board,* 997 F.2d 224, 228 (7th Cir. 1993). The Washington Supreme Court has held there is no reason why the same principle should not apply to a sitting judge. "If a person does not completely surrender his or her right to freedom of speech upon becoming a candidate, then we cannot expect the candidate to do so once elected to judicial office." *Sanders I,* 955 P.2d at 375. The Washington Supreme Court held in *Sanders I* that Canons 1 and 2 may not be applied in a manner that infringes upon a judge's First Amendment rights unless they are narrowly tailored to serve a compelling government interest. *Id.* at 372.

Here, too, violations of Canons 1 and 2(A) cannot form an independent basis upon which to impose sanctions. Justice Sanders was engaged in protected First Amendment activity in this case: meeting with members of the public and discussing issues of public concern. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas"). Such activity is protected by First Amendment rights of speech and association. *Cf. Hudson v. Craven,* 403 F.3d 691, 696-97 (9th Cir. 2005). The very Canons the Washington Supreme Court previously found unenforceable because they infringed on First Amendment rights are the same Canons it claims were violated here, although the court engaged in no First Amendment analysis.

The court's application of the Canons in this case must undergo the most exacting scrutiny. *Cf. Boos v. Barry,* 485 U.S. 312, 321 (1988). This Court must, therefore, balance Justice Sanders's First Amendment rights against the interest the CJC is aimed at protecting. The competing interests at stake here are the government's interest in an impartial judiciary and Justice Sanders' right as an elected public judicial official, and a citizen, to freely engage in discussions with others on *issues* of public importance. The Commission bore the initial burden to establish

a compelling governmental interest and demonstrate that its restrictions are narrowly tailored to serve that interest. It did not do so, and enforcement of the Canons under these circumstances serves to chill a judge's exercise of First Amendment speech and association rights. Enforcing these vague Canons on the basis of a general discussion of a topical legal issue, when no impermissible ex parte communications occurred, creates a chilling effect on where other judges will go and what they will be willing to say.

E. Canons 1 and 2(A) Serve No Compelling Government Interest

Recent authority from this Court compels the conclusion that the government's purported interests in this case do not trump Justice Sanders' rights of expression and association. In *Republican Party of Minnesota v. White*, 536 U.S. 765, 768 (2002), this Court addressed whether the First Amendment permits a state supreme court "to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues." This Court held that such an "announce" clause in the Minnesota CJC "both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms.'" *Id.* at 774.

Minnesota offered two interests that it claimed were compelling "to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary." *Id.* at 775. This Court held that under any definition of "impartiality," Minnesota's announce clause failed to withstand strict scrutiny. *Id.* at 775-84.

According to *White,* the term "impartiality" in the judicial context may mean lack of preconception in favor of or against the particular *legal* view taken by a party. But this sort of impartiality does not guarantee a judge's neutrality on a particular issue of law, rather guarantees litigants an equal chance to persuade the court on the merits of their cases. *Id.* at 775-76.

While "[i]mpartiality in this sense may well be an interest served by the announce clause, . . . it is not a *compelling* state interest as strict scrutiny requires." *Id.* (emphasis in original); *see also, Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 842 (1978). Avoiding judicial predispositions as to legal issues can no longer be considered a compelling interest after *White. See, e.g., N.D. Family Alliance, Inc. v. Baker*, 361 F.Supp.2d 1021, 1040 (D. N.D. 2005).

Promoting "impartiality" in the sense of "open-mindedness" is not a compelling state interest under *White.* This Court reasoned that "[b]efore they arrive on the bench . . . judges have often committed themselves on legal issues that they must later rule upon . . . . More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench." *White*, 536 U.S. at 779. Therefore, the fact that a judge might have an opinion on a legal issue does not make impartiality in that sense a compelling state interest.

Washington's purported compelling interest is the same as that advanced and rejected in *White*. Although Canons 1 and 2(A) are not identical to the "announce" clauses at issue in *White*, they have the same effect: prohibiting public discussion by a judge on an issue of public interest. Washington, like most other states, elects its judiciary. Wash. Const. art. IV, § 3; RCW 2.02.071. The First Amendment does not prevent elected state judicial officers from discussing relevant issues with the public. "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles." *White,* 536 U.S. at 788, 792.

In enforcing Canons 1 and 2(A), the Commission cannot demonstrate a compelling interest sufficient to override First Amendment rights.

F. Canons 1 and 2(A) Are Not Narrowly Tailored

Even if a compelling state interest could be articulated, Canons 1 and 2(A) are not narrowly tailored to serve that interest. *White* is instructive. There, the first definition of impartiality examined by the Court was the "lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law . . . [and] guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *White,* 536 U.S. at 775-76 (emphasis in original). This Court held that the announce clause was not narrowly tailored to serve impartiality in this sense. *Id.* at 776-77.

Canons 1 and 2(A), as applied in this case, also are not narrowly tailored to serve the appearance of impartiality to the parties to a proceeding. The Commission imposed sanctions based on Justice Sanders' appearance of partiality on the *issue* of "volitional control," not bias for or against any parties to the actual legal proceeding. Any argument that there was an appearance of impartiality in favor of parties involved in *Thorell* fails. Justice Sanders did not know that one resident he met, and had general discussions with, was involved in *Thorell*. Justice Sanders never even discussed with that particular resident whether the resident felt he could control his sexual urges. The finding by both the Commission and the Washington Supreme Court that Justice Sanders' general inquiries on the subject of personal ability to control sexual urges did not violate Canon 3(A)(4) vitiates any argument about impartiality as it relates to any party.

If preserving the appearance of impartiality is important, a more narrowly tailored alternative than discipline and abridgement of First Amendment rights is available: disqualification. *See White* 536 U.S. at 794; *N.D. Family Alliance,* 361 F.Supp.2d at 1042. Canons 3(D) and 3(E) of the Washington CJC provide for disqualification. With a more narrowly tailored alternative available, curtailing First

Amendment rights using the CJC is constitutionally impermissible.

Canons 1 and 2(A), as applied, "reach[ed] far beyond speech that could reasonably be interpreted as committing the candidate to a way that would compromise his impartiality." *Buckley*, 997 F.2d at 228. *See also, Family Trust Foundation of Ky., Inc. v. Wolnitzek*, 345 F.Supp.2d 672, 711 (E.D. Ky. 2004) (statute prohibiting judicial candidate from making promises, pledges or commitments not narrowly tailored under strict scrutiny). Indeed, under the decision of the Washington Supreme Court, the only safe bet for Justice Sanders was to *avoid any discussions on any topic*, legal or otherwise. Such "an overinclusive rule has the effect . . . of greatly curtailing an important part of the speech 'market,' the rule is deeply problematic." *Buckley*, 997 F.2d at 229. The fact that "some of the statements forbidden by the rule . . . are within the state's regulatory power cannot save the rule. A statute that forbids, or can fairly be read to forbid, privileged speech is not saved by the fact that it also forbids unprivileged speech and could in application be confined to the latter." *Id.* at 230. No showing can be made that Canons 1 and 2(A), as applied, are narrowly tailored to serve a compelling governmental interest. Under the First Amendment, the finding of a violation of Canons 1 and 2(A) alone fails.

G. The Commission's Structure Violated Justice Sanders' Procedural Due Process Rights

To determine whether a procedure violates due process, this Court engages in a two-step analysis. The Court first determines whether a liberty or property interest exists entitling an individual to due process protections. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). If there is a constitutionally protected interest, then the Court must employ a balancing test to determine what process is due. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). A license is a protected property interest while a person's professional reputation is a protected liberty interest. *See Barry v. Barchi*, 443 U.S. 55, 64 (1979) (noting a person's property interest in a professional license is

sufficient to invoke the protection of the Due Process Clause); *Paul v. Davis*, 424 U.S. 693, 723 (1976) (Brennan, J., dissenting) (recognizing that "the enjoyment of one's good name and reputation has been recognized repeatedly . . . as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty.'").

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews*, 424 U.S. at 332 (citation omitted). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). This requirement applies to adjudicatory proceedings before administrative agencies as well as to courts. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). Not only is a biased decision-maker constitutionally unacceptable, but "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955) (judge who served as complainant, prosecutor, and judge in contempt proceeding was personally biased in favor of conviction). As this Court stated in *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 182 (1938):

> The right to be heard implies a reasonable hope of being heeded. The right to be heard in a public hearing contemplates that, . . . , *the hearing must be conducted as to be free from bias and prejudice; it must not only be open-minded and fair, but must have the appearance of being so*. The word "hearing" in a statute shows a manifest purpose to afford due process of law.

(emphasis added). Accordingly, due process violations may be adjudged not only on the basis of actual harm, but also on the basis of *the risk that potential harm may occur* due to an inherent flaw in the process itself. *See Mayberry v. Pennsylvania*, 400

U.S. 455, 469 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process.").[16]

Washington's Commission combines the investigatory and adjudicatory functions. Wash. Const., art. IV, § 31.[17] This structure is commonly referred to as a "one-tier system." Shaman, Lubet and Alfini, JUDICIAL CONDUCT AND ETHICS 433 (3rd ed. 2000). The Commission's single panel of judges, lawyers, and non-lawyer members handles all phases of the process from investigation through adjudication and determination of sanction. In a two-tier system, the investigative and adjudicative functions are separated. *See id.* The Commission's one-tier system, as it operated here, violated Justice Sanders' procedural due process rights because the blending of investigatory, prosecutorial, and adjudicatory functions created a high risk of bias.

This Court upheld the constitutionality of an administrative disciplinary system which combined investigatory and adjudicative functions in *Withrow v. Larkin*, 421 U.S. 35, 54-55 (1975). There, the Court rejected the argument that bias automatically arises from a commingling of the investigatory and adjudicatory functions. Since *Withrow*, judicial conduct commissions have been established all across the nation, including Washington. This Court has never addressed whether the general administrative scheme for the executive branch addressed in *Withrow* is appropriate for the judicial branch. The

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[16] It is important to distinguish the necessity of an appearance of fairness as a standard for disqualification from the appearance of impropriety as a basis for *discipline*. Disqualification, unlike discipline, does not result in punishment. Moreover, the appearance of fairness standard requires that the proceedings before a tribunal be and appear fair, to the parties to the proceeding. By contrast, the appearance of impropriety standard as a basis for discipline goes well beyond actual parties to a proceeding. It concerns public perceptions generally, not just those of the litigants whose cases might be affected.

[17] Justice Sanders contends the Commission went a step further in his case by also mingling some prosecutorial functions with the investigative and adjudicative functions. *See, infra.*

propriety of a one-tier system in the judicial context has been a source of litigation through the years.

For more than 30 years, *Withrow* has been argued to reject the idea that the blending of adjudicative and investigative functions is a denial of due process. *See, e.g., In re Matter of Davis*, 129 Ariz. 1, 628 P.2d 38, 40 (Ariz. 1981); *In re Crooks*, 51 Cal.3d 1090, 275 Cal.Rptr. 420, 800 P.2d 898, 904 (Cal. 1990); *People v. Varallo*, 913 P.2d 1, 4-5 (Colo. 1996); *In re Zoarski*, 227 Conn. 784, 632 A.2d 1114, 1121 (Conn. 1993); *In re Disciplinary Proceeding Against Deming*, 108 Wn.2d 82, 736 P.2d 639 (Wash. 1987). *Accord Pathak v. Dep't of Veterans Affairs*, 274 F.3d 28, 33 (C.A.1 Me. 2001); *Calenda v. Rhode Island Bd. of Medical Review*, 565 F. Supp. 816, 820 (D.R.I. 983).

Courts facing such a constitutional challenge, however, have often skirted the issue by ignoring the second part of the *Withrow* court's decision, namely, that a court is not precluded from finding a denial of due process where the risk of unfairness from the commingling of functions is intolerably high based on the specific facts and circumstances present in the case before it. *See Withrow*, 421 U.S. at 47, 58. This Court should remind lower courts of this vital second step. What the Constitution requires, if more than one function is reposed in a single body, is that walls be erected between functions to eliminate the threat of bias and unfairness.

Withrow does not specifically address the unique quasi-criminal process by which a state's judicial branch disciplines judges. *See In re Ruffalo*, 390 U.S. 544, *modified on other grounds*, 392 U.S. 919 (1968) (recognizing that attorney disciplinary proceedings are neither criminal nor civil in nature but adversarial proceedings of a quasi-criminal nature). *See also, Tweedy v. Oklahoma Bar Ass'n*, 624 P.2d 1049, 1053 (Okla. 1981) (acknowledging *Withrow* but stating that in "contrast to the principles which affect administrative agencies, due process is offended when a judicial institution functions both as an organ of enforcement and adjudication"); *In re Disciplinary*

Proceeding Against Ritchie, 123 Wn.2d 725, 870 P.2d 967, 970 n.1 (1994) (noting judges are entitled to the same procedural due process protections as lawyers facing disbarment).

Unlike the Commission's overlapping one-tier system, an acceptable division of functions can be found in the ABA's Model Rules for Judicial Disciplinary Enforcement (MRJDE). The MRJDE require that the membership of a judicial conduct commission be divided into separate investigative and hearing panels. MRJDE, Section 1, Rule 3(1). Under this rule, no commission member can be involved both in deciding whether to file formal charges and in hearing the case on those charges. The Commentary to the rule states why:

> The Rules seek to separate the investigative and the adjudicative functions of commission members. No matter how fair individual members can be, the system cannot convey the appearance of fairness when members have full access to investigative materials, formulate their decisions to file charges in reliance on the investigative files and then make adjudicative decisions based on the evidence presented in formal proceedings. This process is in conflict with the fundamental division of investigative and adjudicative responsibilities that is a hallmark of our judicial system.

Comment, MRJDE to Rule 3.1.

Other courts have found the commingling of investigative and adjudicatory functions to be a denial of due process. For example, in *Lyness v. Comm., State Bd. of Medicine*, 529 Pa. 535, 605 A.2d 1204 (Pa. 1992), a physician's license to practice medicine was revoked by the Pennsylvania Board of Medicine. He appealed, arguing his right to due process was violated because the Board acted as both prosecutor and adjudicator. *Id.* at 255. In reversing the Board's licensing decision, the Pennsylvania Supreme Court noted the procedures followed by the Board created an unconstitutional commingling of the prosecutorial and adjudicatory functions into a single entity. Whether actual bias existed as a result of the Board acting as

both prosecutor and judge was inconsequential; the potential for bias and the appearance of non-objectivity was sufficient to create a fatal defect under the Pennsylvania due process clause. *See also In re Ross*, 99 Nev. 1, 656 P.2d 832, 840 (Nev. 1983) (procedure by which board of bar governors functioned as fact finder in disciplinary proceeding against attorneys, involving costs which were substantial and recoverable by state bar only upon finding of misconduct, violated due process); *See Tweedy,* 624 P.2d at 1054-55 (finding due process violation where adjudicatory and executive functions were combined during attorney disciplinary proceedings).

As applied here, the rules and statute governing the Commission impermissibly blur the lines between the investigative, prosecutorial, and adjudicatory functions. There is no wall between the three, and the risk of unfairness is intolerably high.

H. Due Process Permits an Accused Judge to Learn What Information His Judges Received and Whether They Were Biased As a Result

Even if this Court finds that Washington's one-tier system does not violate due process, it needs to address the rights of an accused judge to obtain information his or her adjudicators received about the case inside and outside the formal proceedings. It is necessary to do so to give vitality to the second, and equally important, aspect of *Withrow.* There, this Court recognized due process rights could be violated if there was something "more" at issue than the mere existence of a one-tier system. *Withrow,* 421 U.S. at 58.

Like the illustrative cases referenced above, Justice Sanders' constitutional challenge to the Commission's one-tier system is distinguishable from the challenge in *Withrow* because there is something "more" occurring here that creates the impermissible risk of actual bias or prejudgment. In *Withrow*, a licensed physician sought to enjoin a disciplinary hearing to be conducted by the Wisconsin Medical Examining Board, the same Board that had investigated the charges against him. *Id.* at

39. The district court agreed such a procedure would constitute a denial of due process and issued a restraining order. In reversing the decision of the district court, this Court held the procedure suffered no constitutional infirmity. In particular, this Court noted the investigative proceedings were closed to the public but the physician and his counsel were present throughout; counsel actually attended the disciplinary hearings and knew the facts presented to the Board. *Id.* at 55. No specific foundation was presented for suspecting the Board had been prejudiced by its investigation or was disabled from hearing and deciding the case on the basis of the evidence presented at the contested hearing. *Id.*

Here, the Commission has constructed rules of procedure designed to preclude a judge from ascertaining if there is something "more" at issue than just a combination of functions. The Commission decides what information an accused judge may receive, and what witnesses it will disclose. There is no discovery without disciplinary counsel or its consent. With no analysis, the Washington Supreme Court says this is constitutionally sufficient. The accused judge, unlike the doctor in *Withrow*, has no ability to know what his adjudicators considered.

Justice Sanders was not present during the Commission's investigative proceedings nor was he permitted to learn what facts were presented to the Commission. Pursuant to the Commission's rules, Justice Sanders sought discovery to defend himself. In particular, he sought to determine if any Commission member should be challenged for bias. Justice Sanders specifically asked for copies of the newspaper articles Commission members considered in relation to his case. He also sought to discover what other information may have been communicated to the Commission by its staff and disciplinary counsel. Such information is vital to his due process rights. His discovery requests were denied.

The importance of being allowed to inquire is illustrated by the fact that after Justice Sanders obtained independent

information about one commission member and challenged her, she recused. This is exactly the type of bias Justice Sanders sought to uncover, and which the Commission prevented him from pursuing. In resolving this case, this Court does not need to delve into the details of discovery requests. Instead, this Court needs to decide the broader issue of whether discovery is allowed to determine if there is something "more" at issue, as the *Withrow* analysis requires.

There is an added dimension here to the something "more" required by *Withrow* because the Commission may have also commingled the prosecutorial function with the investigative and adjudicative functions. Commission members were not only aware of possible settlement discussions, but directed them to occur. The Commission's disciplinary counsel met with its Executive Director to discuss such negotiations. The Commission asked for and received legal briefings from staff regarding the potential charges it was being asked to file against Justice Sanders. Disciplinary counsel wrote an op ed about the case while it was pending, identifying herself as "Commission Counsel." Straying into prosecution and settlement clearly should be addressed by this Court in determining whether Washington's one-tier judicial disciplinary system is unconstitutional. The Commission strayed from the accepted bounds of due process.

CONCLUSION

The Washington Supreme Court overlooked serious constitutional infirmities in the Canons, as well as its entire judicial disciplinary system, in reaching its result in this case. The court's decision reaches far beyond the Washington state borders. It condones the severe curtailment of the free speech and association rights of judges. It allows prosecutors and investigators to sit in judgment over the soundness of their own case. It allows secret evidence to sway potentially biased adjudicators, with no hope of access, reply, or redress for the accused judge. This Court should accept review to preserve the constitutional rights of all judges and professionals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON FILED OCTOBER 26, 2008

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 200,271-4

EN BANC

In the Matter of the Disciplinary Proceeding Against

RICHARD B. SANDERS,

Justice of the Supreme Court of the State of Washington.

Filed October 26, 2006

GROSSE, J.* — A visit by a judicial officer to a special facility for sexually violent predators is not in itself inappropriate conduct under the Code of Judicial Conduct. However, conversations with the residents of the facility concerning the reasons for their confinement, particularly when one or more of these residents has a matter or matters pending before the court on which the judge sits, can violate the Code of Judicial Conduct. By asking questions of inmates who were litigants or should have been recognized as potential litigants on issues currently pending before the

* Judge C. Kenneth Grosse and each member of the en banc court are serving as justices pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a) and Discipline Rules for Judges 13.

court, Justice Richard B. Sanders violated the Code of Judicial Conduct. His conduct created an appearance of partiality as a result of ex parte contact.

The Washington Commission on Judicial Conduct (Commission) received a complaint on March 18, 2003, regarding Justice Sanders' conduct while visiting the Special Commitment Center (SCC) on McNeil Island. The Commission conducted an independent investigation of the allegations, determined that sufficient evidence existed to support the complaint, and sent a Statement of Allegations to Justice Sanders on October 8, 2003. In April 2004, the Commission determined that probable cause existed to believe that Justice Sanders violated Canons 1, 2(A) and 3(A)(4) of the Code of Judicial Conduct.[1] After a fact-finding

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1. **CANON 1**
Judges Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2
Judges Should Avoid Impropriety and the Appearance of Impropriety in All Their Activities

(A) Judges should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(Cont'd)

hearing, the Commission issued its decision holding that Justice Sanders violated Canons 1 and 2(A), but did not violate Canon 3(A)(4). The Commission found that Justice Sanders' conduct violated Canon 1 by failing to enforce high standards of judicial conduct and also violated Canon 2(A) by failing to promote public confidence in the integrity and impartiality of the judiciary. The Commission imposed the sanction of admonishment. Under Discipline Rules for Judges 3, Justice Sanders filed a notice of contest.

It is well established that disciplinary proceedings are reviewed de novo.[2] Accordingly, this court must make its

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(Cont'd)

CANON 3
Judges Shall Perform the Duties of Their Office Impartially and Diligently

. . . .

(A) Adjudicative Responsibilities.

. . . .

(4) Judges should accord to every person who is legally interested in a proceeding, or that persons lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. Judges, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before them, by amicus curiae only, if they afford the parties reasonable opportunity to respond.

2. *In re Disciplinary Proceeding Against Turco,* 137 Wn.2d 227, 245-46, 970 P.2d 731 (1999) ("[D]e novo review means we are not (Cont'd)

own determination of the facts and the law as required in a de novo review.[3] The Commission bears the "burden of proving factual findings by clear, cogent, and convincing evidence."[4]

Justice Sanders embarked on a tour of the SCC despite warnings from his colleagues on the Supreme Court about potential ex parte contact with litigants. During the tour of this facility, Justice Sanders accepted documents on two separate occasions from the inmates. Moreover, in meetings

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(Cont'd)
bound by the Commission's findings and conclusions. We must independently evaluate the evidence in the Commission's record to determine if the judge violated the Code and to determine the proper sanction. In so doing, we necessarily give 'considerable weight' to the credibility determinations of the Commission, as the body that had the opportunity directly to observe the witnesses and their demeanor. [*In re Disciplinary Proceeding Aaainst] Deming,* 108 Wn.2d [82,] 110[, 736 P.2d 639 (1987)]. We also give 'serious consideration' to the Commission's recommendation on the appropriate sanction. *In re Disciplintary Proceeding Against Ritchie*, 123 Wn.2d 725, 731, 870 P.2d 967 (1994).").

3. *See also Deming,* 108 Wn.2d at 87 (1987) (emphasis omitted) (alteration in original) (footnote omitted) (quoting *In re Cieminski,* 270 N.W.2d 321, 326 (N.D. 1978)):

> "With this responsibility and power comes the concomitant obligation to conduct an independent inquiry into the evidence to determine whether or not the evidence merits the imposition of any penalty as recommended by the [Commission] or otherwise."

4. *Turco,* 137 Wn.2d at 246.

with the residents, some of whom had cases pending before the court, he directly asked them about the issue of volitional control.

At the time of the visit, the Supreme Court was in the process of deciding *In re Detention of Thorell*.[5] Drafts of both a majority opinion and a dissent by Justice Sanders were circulating among the justices at the Supreme Court. *Thorell* was a seminal case in which separate actions by six petitioners were combined, including at least one of the SCC residents with whom Justice Sanders met. A pivotal issue before the Supreme Court in *Thorell was* volitional control. The court was weighing whether the "fact finder must determine that the person facing commitment as a sexually violent predator (SVP) has serious difficulty controlling behavior and, if so, whether this determination must be a separate finding based upon a jury instruction."[6] Thus, the factual record was before the court in each of the consolidated six cases.

The Commission held, and we agree, that the record established through clear, cogent, and convincing evidence that Justice Sanders violated Canons 1 and 2(A). In support of that holding, the findings reference two of the three letters from resident Andre Brigham Young inviting the justices to visit McNeil Island. Those letters indicate that the residents were looking for something more than just a tour of the facility. In fact, Young suggested that others (opposing

5. *Thorell,* 149 Wn.2d 724, 72 P.3d 708 (2003), *cert. denied,* 541 U.S. 990 (2004).

6. *Thorell,* 149 Wn.2d at 730.

counsel and defense attorneys) should be asked to attend to avoid "the appearance of partiality." The letters in and of themselves should have given sufficient notice to Justice Sanders that this visit had the potential of being more than an institutional tour. Additional warning flags were also raised by three justices who expressed concerns about the visit and potential problems. Moreover, a simple computer check would have revealed that Rickey Calhoun and Andre Brigham Young, two people mentioned in the prior communication with Justice Sanders, had cases pending before the Supreme Court. When Justice Sanders met with the residents in small groups, he warned the residents that he could not hear their particular case issues. However, these warnings were followed by specific questions asking the residents about their confinement and what they thought of volitional control.

The Commission justifiably found that Justice Sanders, with full awareness of the potential for situations that could conflict with the Code of Judicial Conduct, embarked on the tour and met with litigants who had pending cases before the court. Further, by raising such critical issues as volitional control with these litigants, Justice Sanders created a situation that clearly violated both the letter and the spirit of the canons and created serious concern for both counsel and fellow jurists about the appearance of partiality.

Justice Sanders claims that a violation of Canons 1 and 2(A) cannot be found without a concomitant violation of a proscribed act or canon and thus the Commission's failure to find a direct violation of Canon 3(A)(4) precludes it from finding a violation of the other canons. We disagree.

Appendix A

In our view, *Turco*[7] is dispositive. There, the court found that the judge's act of striking his wife in public had a sufficient nexus to the judicial role, particularly when the judge heard domestic violence cases. If extrajudicial tortious conduct can provide a nexus to the judicial role, then *a fortiori,* judicial conduct can provide a basis for a violation of Canons 1 and 2(A). In the instant case, Justice Sanders' actions were not simply undertaken as a private citizen, but rather within the context of his judicial duties. Our conclusion is underscored by the decision in *In re Disciplinary Proceeding Against Ritchie.*[8] In that case, Judge John G. Ritchie argued that Canons 1 and 2(A) of the Code of Judicial Conduct, together with the statute regulating the behavior, were too vague to give him adequate notice of the prohibited behavior. In denying the claim, the court stated:

It is true the conduct pursuant to which he was disciplined is

> not clearly proscribed by RCW 3.58.040, insofar as the statute does not expressly prohibit judges from combining business and pleasure trips, and does not define "reasonable traveling expenses" or "business of the court".
>
> Judge Ritchie's vagueness challenge is ultimately immaterial, however, because he was not disciplined for violating the statute. Rather,

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7. *Turco,* 137 Wn.2d 227.

8. *Ritchie,* 123 Wn.2d 725.

> he 'was censured for violating [C]anons 1 and 2(A) of the Code of Judicial Conduct which hold .judges to a higher standard ofintegrity and require avoiding even the appearance of impropriety.[9]

As noted in the Commission's decision, there are a number of facts in this case that, when taken together, clearly demonstrate that a predictable appearance of partiality could be foreseen.

Where a judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating. The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution.[10] Under Canon. 3(D)(1), "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned."[11] In *Sherman*[12] the court found that where a trial judge "may have inadvertently obtained information critical to a central issue

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9. *Ritchie,* 123 Wn.2d at 735.

10. *State v. Graham,* 91 Wn. App. 663, 670, 960 P.2d 457 (1998).

11. Justice Sanders eventually disqualified himself from deciding these inmates' cases involving the issue of volitional control. A judge's subsequent recusal may remove the "suspicion of partiality" and satisfy Canon 3(D)(1) in specific cases, but it does not necessarily erase violations of other canons of the Code of Judicial Conduct. *See Sherman v. State,* 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995).

12. *Sherman,* 128 Wn.2d 164.

on remand, . . . a reasonable person might question his impartiality."[13] The court set the test for determining impartiality:

> [I]n deciding recusal matters, actual prejudice is not the standard. The [Commission] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating . . . . The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and understands all the facts."[14]

This court in *In re Disciplinary Proceeding Against Sanders*[15] noted that the interest of the State in maintaining and enforcing high standards of judicial conduct under the auspices of Canon 1 is a compelling one.[16] In *Sanders,* this court balanced that interest against Justice Sanders' First

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13. *Sherman,* 128 Wn.2d at 206.

14. *Sherman,* 128 Wn.2d at 205-06 (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

15. *In re Disciplinary Proceeding Against Sanders,* 135 Wn.2d 175, 187-88, 955 P.2d 369 (1998).

16. *See In re McCully,* 942 P.2d 327, 332 (Utah 1997), where the court upheld a reprimand for a judge who had given her opinions to a family court regarding an issue before it. There the court stated (Cont'd)

Amendment rights and found that an independent basis for finding a violation of Canon 1 under those circumstances was not possible. Justice Sanders argues that the language in Canon 1 is hortatory and therefore cannot stand as an independent basis for a violation of the Code of Judicial Conduct. In the instant case, Canon 1 sets the conceptual framework under which Canon 2(A) operates. Canon 2(A) provides the more specific restraint, to wit: "Judges should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Under the circumstances of this case, Canon 1 taken in conjunction with Canon 2(A) provides a sufficiently specific basis to find a violation of the Code of Judicial Conduct. Here, it was clear that there was a substantial basis and expectation that Justice Sanders would be in contact with possible litigants who had pending litigation before the court and that this contact would be viewed as improper.[17] We concur with the Commission's finding that it was clearly

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(Cont'd)

that statutory language "'conduct prejudicial to the administration of justice which brings a judicial office into disrepute'" while broad, is not so vague that it, does not have any meaning. *McCully,* 942 P.2d at 332 (quoting former Utah Code Ann. § 78-7-28(1)(e), *recodified as* 78-8-103(1)(e) (2000)); *see also In re Parro,* 847 So. 2d 1178, 1181 (La. 2003). There the Louisiana Court held that even though an appellate judge did not intentionally violate the Code of Judicial Conduct, his interventions upon the behalf of his niece were improper. The canons were devised to promote a high standard for judicial conduct. Judges are the symbol of the law, and as such their actions reflect upon the judicial system.

17. *See Papa v. New Haven Fed'n of Teachers,* 186 Conn. 725, 744-46, 444 A.2d 196 (1982) (footnotes omitted):

(Cont'd)

reasonable to question the impartiality of the justice under the circumstances of this case.

Justice Sanders also raises the issue of whether he was' denied due process because of the failure to grant his discovery requests. He bases this claim on his characterization of the proceedings as criminal in nature.

(Cont'd)

> The defendants are correct, however, when they question the standard by which the court evaluated their first motion for recusal. The standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case. In Connecticut, the disqualification of judges is governed by General Statutes § 51-39 and Canon 3 (C) of the Code of Judicial Conduct. Under Canon 3 (C) (1) of the Code of Judicial Conduct "[a] judge should disqualify himself [or herself] in a proceeding in which his [or her] impartiality might *reasonably* be questioned . . . ." (Emphasis added). "Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification. Thus, an impropriety or the appearance of impropriety . . . that would reasonably lead one to question the judge's impartiality in a given proceeding clearly falls within the scope of the general standard . . . " Thode, Reporter's Notes to Code of Judicial Conduct (1973), pp. 60-61. "The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his [or her] impartiality, on the basis of all of the circumstances." *Rice v. McKenzie,* 581 F.2d 1114, 1116 (4th Cir. 1978).

However, this court has consistently held that judicial disciplinary proceedings are civil in nature.[18]

It is well settled that the scope of discovery is a matter best left to the trial court's discretion.[19] in cases such as this, that discretion initially lies with the Commission. Justice Sanders was provided with a list of the residents with whom he had conversations, a list of the cases they were involved in as well as the essence of the conversations. Names of witnesses were also provided under Commission on Judicial Conduct Rules of Procedure (CJCRP) 22(a)(2). Justice Sanders also had access to all of the testimony and cross-examined all of the witnesses at the contested hearing. There is no basis to find that Justice Sanders was denied due process.

Finally, we turn to the question of whether the sanction imposed by the Commission was proper. After a thorough review of the record, we find that the Commission correctly applied the 10 nonexclusive factors as set forth in CJCRP 6(b) and in *Deming*.[20] The sanction of admonishment is appropriate and sufficient in this case.

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18. *Deming*, 108 Wn.2d at 102-03.

19. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984).

20. *Deming*, 108 Wn.2d at 119-20.

APPENDIX B — CORRECTED AMENDED COMMISSION DECISION DATED MAY 27, 2005 AND FILED JULY 13, 2005

BEFORE THE COMMISSION ON JUDICIAL CONDUCT OF THE STATE OF WASHINGTON

No. 4072-F-109

In re the Matter of

RICHARD B. SANDERS, Justice,
Washington Supreme Court

CORRECTED AMENDED COMMISSION DECISION

This matter came on for a fact-finding hearing before the Commission on Judicial Conduct sitting in Kent, Washington on December 6 - 10, 2004. The Commission members participating as the fact-finding panel for this matter were Wanda Briggs; Harold D. Clarke, III; Marianne Connelly; Antonio P. Cube; Judie Fortier; Joel Penoyar; John A. Schultheis; Mike Sotelo; Josephine Townsend; Betsy Wilkerson; and Gregory R. Dallaire, Presiding Officer.

Katrina C. Pflaumer of Seattle appeared as Disciplinary Counsel. Respondent was present and represented by Kurt M. Selmer.

The Commission heard and considered the testimony of witnesses, the stipulation of the parties regarding admissions, the exhibits admitted into evidence, and the briefs and arguments of counsel.

Appendix B

PROCEDURAL HISTORY

This matter commenced when a complaint was filed with the Commission on March 19, 2003. On May 29, 2003, the Respondent wrote a letter to the Commission in response to a news article that his tour may have prompted a complaint to the Commission.

After preliminary investigation, a confidential Statement of Allegations was sent to the Respondent on October 8, 2003. The Respondent replied on October 29, 2003. The original filing of the Statement of Charges was held pending settlement negotiations until April 5, 2004. Respondents Answer to the Statement of Charges was received on April 28, 2004. By an order filed June 17, 2004, in a ruling on motions brought by the Respondent, the Presiding Officer denied certain discovery requests. By an order filed August 27, 2004, in a ruling on Motion for Summary Judgment brought by the Respondent, the Commission dismissed certain affirmative defenses as a matter of law. By an order filed October 7, 2004, the Washington State Supreme Court (pro tem) denied Respondent's Request for Discretionary Review of the June 17, 2004, Order.

At the commencement of the fact-finding hearing, the Commission accepted into the record a Stipulation and Witness List filed December 6, 2004. After the fact-finding hearing, the Commission's Decision was filed on April 8, 2005. Thereafter, Disciplinary Counsel and Respondent's Counsel filed various motions, responses and replies related thereto. The Commission amended its decision by order dated May 27, 2005.

Appendix B

FINDINGS OF FACT

By letter dated December 17, 2002, the Respondent, along with the other Supreme Court Justices, was invited to visit the McNeil Island Special Commitment Center for sexually violent predators. (ex. 200) The invitation was extended on the letterhead of the African American Collective, a group of persons who were committed at the Center. A resident, Andre Brigham Young, was identified as the contact person for the Collective. (ex. 200) At the time of the letter and subsequent tour, Andre Brigham Young had a matter filed in the Washington State Supreme Court. (ex. 180) The letter requested that the Justices "evaluate and calculate" the application of RCW 79.01, et seq. through an on-site tour of the facility by conversing with the residents and staff. (ex. 200) Subsequently, the Respondent replied to Andre Brigham Young (Sanders' testimony, p. 1034) and, through his staff, initiated contact with the superintendent of the facility to make the arrangements for touring the Center. (Sanders' testimony, p. 915) January 27, 2003, was established as the date for the visit (ex. 203) On January 8, 2003, the Respondent sent a memorandum to the other Supreme Court Justices indicating that he had made arrangements for the visit He requested anyone interested in attending to get back to him with certain information required by the facility for visitors. (ex. 203) The visit to the Center was discussed by the Justices en banc on January 9, 2003. (ex. 204)

At the meeting, Justice Mary Fairhurst expressed her concern about the Respondent accepting an invitation from residents of such an institution. After further discussion

among the Justices, it was concluded that her concerns could be addressed and a number of the Justices, including Justice Fairhurst and Justice Faith Ireland, expressed an interest in attending the tour. (Fairhurst testimony, pp. 66-67)

The following day, January 10, 2003, Justice Ireland wrote the superintendent of the Center (copying the Respondent and Andre Brigham Young) noting her interest in touring the Center and visiting with residents. The letter also stated the visit would not be an evaluation, but would be "informational only". (ex. 205) On January 13, 2003, Andre Brigham Young again wrote to the Respondent informing him that three members of the African American Collective, including Rickey Calhoun, would be meeting him at the main gate inside the visiting room. At the time of the letter and subsequent tour, Rickey Calhoun had a matter filed in the Washington State Supreme Court. (ex. 155) After identifying specific areas that should be toured, the letter stated as follows:

> There are areas the SCC Administration would rather you didn't see. That is why we make the request of you to insist that representatives of the African American Collective be there to not only greet you upon your arrival, but also to be part of escorting you to the many different areas listed above. After all, the Collective was responsible for inviting you here, not the SCC Administration.

Attached to the letter, was the Third Quarter 2002 Report from the SCC Ombudsman. The first sentence of the report's conclusion states as follows: "SCC is further than ever from creating a constitutionally adequate facility." (ex. 206)

Appendix B

The January 13, 2003 letter and attachment generated further interest and concern among the Respondent's colleagues on the Supreme Court. After reviewing the letter, Justice Fairhurst wrote to the Respondent on January 21, 2003 indicating that Andre Brigham Young's letter had caused her to reconsider her decision to tour the facility. She reiterated her issue about responding to the specific request of a resident or group of residents. She also provided the Respondent with a list of published and unpublished cases brought by Andre Brigham Young in both federal and state courts on various issues. (ex. 210)

Chief Justice Alexander's testimony also reflects concern:

> The red flag that went up for me is I thought that he, Andre Brigham Young, was under a misunderstanding that was not consistent with Justice Sanders' memo or Justice Ireland's email, that we were really making an official visit through the auspices of the staff there and not accepting Andre Brigham Young's invitation, and I was concerned that the misunderstanding might lead to difficulties, and so that was the red flag, if you will, that went up for me. (Transcript p. 138)

Approximately a week after seeing the January 13, 2003 letter, Justice Ireland determined that she would not participate in the tour. She informed the Respondent and warned him about the differing expectations and her concern that dialogue with the residents about their conditions of confinement would be raised in issues being later presented

to the Supreme Court. She testified to a second discussion with the Respondent:

> We had another conversation later on about the trip and whether the trip should be made and, again, in the same sort of thing across the table from one another where I said, Richard, don't do this, and it was, you know, I was saying, making a warning statement to him, don't do this, and you know, this is a mistake, don't do this, but I think that was probably a week or so after that 13th letter. (Transcript p. 242)

Shortly thereafter, Justice Ireland bowed out of the tour in a January 22, 2003, letter to the superintendent of the Center. She noted concern about the expectations of the visit as expressed by Andre Brigham Young as well as the high volume of litigation the residents have in the Supreme Court. (ex. 211)

On January 23, 2003, the Respondent wrote the superintendent of the Center. The letter stated in part:

> Please advise the residents that it is not my role to factually investigate particular legal circumstances of any individual and that discussion of same might be grounds to seek my recusal in any pending or future proceeding. That would be my only ground rule and should any discussion lead in that direction I will reiterate what I just said.

Appendix B

Further in the letter, the Respondent cautions:

> Although I have received correspondence from some of the residents regarding the upcoming tour, that correspondence was neither solicited nor responded to, although I agree with its general tenor that the SCC is an important state institution which should be recognized and understood. If there are any particular legal problems, however, they must be dealt with fairly and impartially in the context of appropriate litigation upon which this tour shall and must have no influence whatsoever. (ex. 215)

Between the date of the invitation, December 17, 2002, and the date of the tour, January 27, 2003, a case involving sexually violent predators was in the process of being decided by the Washington State Supreme Court, *In re Thorell. Thorell* consolidated the appeals of Bernard Thorell, Kenneth R. Gordon, Roger C. Bishop, Gordon Michael Strauss, Charles Lee Johnson and Casper William Ross.

At the time of the visit, a dissent authored by the Respondent was being circulated for consideration by the other justices. One of the major issues in *Thorell* was whether a separate jury finding is required on the issue of volitional control in sexually violent predator cases. This is commonly referred to as the "*volitional control*" issue.

Andre Brigham Young also had an appeal filed with the Supreme Court. (ex. 180) That appeal also raised the issue of volitional control. In addition, at the times of the invitation

and subsequent tour, there were several other matters filed in the Washington State Supreme Court by residents of the Center. (ex. 101) The Respondent read no cases nor made any effort to ascertain if a case was pending in the Supreme Court before he went on the tour. (Sanders' testimony, pp. 1017-1018) Further, the Respondent did not notify counsel of the planned tour, i.e., prosecutors or defense for any of the parties who had cases filed in the Supreme Court at the time of the tour.

Sometime before the Respondent visited the facility, lawyers involved in the *Thorell* case and some of the other matters referenced above, (prosecutors in King County and the Attorney General's Office) became aware of the planned visit and communicated among themselves regarding what actions, if any, they should take. (Hackett testimony, p. 823, ex. 607) The visit took place as scheduled on January 27, 2003.

Upon his arrival at McNeil Island, the Respondent was met by Center staff. After a short motor-tour conducted by staff, the Respondent visited a recreation center where he had a brief discussion with one resident. He was then taken to a day room where he was introduced to a large group of residents. After that, the Respondent was directed into a small classroom where he initially met with six to seven residents. After he had an opportunity to engage in discourse with the initial group, other residents entered into the classroom one-by-one to replace a corresponding number of residents who exited the room. Upon leaving the classroom, the Respondent was led upstairs by staff to another dayroom where he talked with some other residents. (testimony of McLaughlin, Harris

and Sanders). In total, the Respondent had individual communications with approximately 20 residents. (ex. 410; Sanders' testimony, p. 951) Four of the persons with whom the Respondent spoke (Calhoun, Johnson, Peterson, and Young), had pending cases filed in the Washington State Supreme Court at the time of the tour.

At the beginning of his discussions with the first group of residents, the Respondent warned them that he could not talk about their personal cases as that might prevent him from hearing matters in the future. (testimony of Farr, Harris, Mahoney and Sanders) Periodically, thereafter, the same caution was mentioned. (testimony of Farr, Harris, Mahoney and Sanders) Addressing the initial group of approximately six residents; the Respondent requested that each of those present tell him about their respective treatment experiences and whether they thought they had lost "*volitional control*" when they committed their crimes. (Sanders' testimony, pp. 948 and 1044; also Farr testimony re "controlling sexual urges" and testimony of Harris, Mahoney and McLaughlin re volitional control.)

Sometime during the tour, the Respondent accepted a "butcher paper" document from Ralph Spink, a resident of the Center. (ex. 406A, ex. 410 and McLaughlin testimony) At the time he handed the document to the Respondent, Ralph Spink had a matter filed in the Washington State Supreme Court. The list was a compilation of twenty-nine concerns created by various residents at the Center. There were several references to treatment and statutes. (ex. 406A) The list had no attribution to a specific resident. The Respondent also accepted a manila folder containing an article regarding

treatment and recidivism of sex offenders from Keith Rogers, another resident of the Center. (ex. 606; Rogers testimony)

The Respondent reviewed the first two to three items listed on the "butcher paper" document after he returned to his office in Olympia. He then placed it in a file cabinet. Without reading it, he also filed away the article contained in the manila envelope he had received from Keith Rogers. (Sanders' testimony, p. 942)

The Respondent made no effort to ascertain the names of the residents with whom he met during the tour. Sometime after the visit, the Respondent was provided with a letter from the Attorney General's Office containing a list of the names of the residents who met with him and short summaries of what was said. (ex. 402; Sanders' testimony, p. 977) The letter that accompanied the list was also sent to counsel representing the residents on the list. (Sanders' testimony, p. 979) The Respondent made no effort to determine whether the individuals on the list had cases before the Supreme Court. (Sanders' testimony, p. 977)

On or about March 18, 2003, a Motion for Recusal was filed in the case of *In re Thorell.* Citing the January visit to the Center, the Motion concluded with the following:

> In order to preserve public confidence in the judicial system, Justice Sanders should no longer participate in deciding this case. (ex. 400)

On April 8, 2003, three Assistant Attorneys General, including the Chief of the Criminal Justice Division, wrote

the Clerk of the Supreme Court, C.J. Merritt. The letter requested that the document given to the Respondent by Ralph Spinks and the content of the conversations on the issue of "*volitional control*" be disclosed and filed with the Clerk's office. (ex. 402) The Respondent gave the "butcher paper" document to the Clerk shortly thereafter. The Respondent granted the Motion for Recusal on May 12, 2003, and removed himself from any further proceedings in the case of *In re Thorell.*

ALLEGED CANON 3(A)(4) VIOLATION

On April 5, 2004, the Commission determined that probable cause existed to believe that the Respondent violated Canon 3(A) (4) of the Code of Judicial Conduct which reads as follows:

CANON 3

Judges shall perform the duties of their office impartially and diligently.

(A) Adjudicative Responsibilities.

. . .

(4) Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

> Judges, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before them, by amicus curiae only, if they afford the parties reasonable opportunity to respond.

The standard of proof required to sustain this violation is clear, cogent and convincing. The record does not meet this high standard. Although there was testimony from witnesses, including the Respondent, that he raised the issue of volitional control during the tour of the Center, the record does not establish that the responses to his general inquiry on the subject were sufficient to sustain a Canon 3(A)(4) violation.

ALLEGED CANON 1 AND CANON 2 VIOLATIONS

On April 5, 2004, the Commission determined that probable cause existed to believe that the Respondent violated Canons 1 and 2 of the Code of Judicial Conduct.

These Canons read as follows:

CANON I

Judges shall uphold the integrity and independence of the judiciary.

> An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining and enforcing high standards of judicial conduct, and

shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2

Judges should avoid impropriety and the appearance of impropriety in all of their activities.

(A) Judges should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) Judges should not allow family, social, or other relationships to influence their judicial conduct or judgment. Judges should not lend the prestige of judicial office to advance the private interests of the judge or others; nor should judges convey or permit others to convey the impression that they are in a special position to influence them. Judges should not testify voluntarily as character witnesses.

There is no evidence on the record to support a violation of Canon 2(B).

The record establishes by clear, cogent and convincing evidence that before, during and after the visit to the Special Commitment Center the Respondent violated Canons 1 and

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2(A). Judges are expected to exercise prudent judgment. In this case, the record is replete with evidence where the Respondent failed to meet that expectation. Those lapses have impaired the integrity and appearance of impartiality of the judiciary and, thus, give rise to the Canon violations.

The following examples illustrate this conclusion:

The letters of December 17, 2002, and January 13, 2003, put the Respondent on notice that some confusion existed about the purpose of the invitation and the expectations of the visit. It was clear that the authors of the letters wanted something akin to an investigation, rather than an informational tour. Concerns about this issue were raised by some of his colleagues on the Supreme Court. The Respondent dismissed their warnings and placed the burden of notifying the residents about the nature of his visit on the Superintendent of the institution.

The Respondent failed to make any inquiries about the people with whom he would be meeting. A cardinal rule in legal ethics is that lawyers do not represent opposing parties or get involved in matters where there is an appearance of a conflict of interest. To avoid such conflicts, lawyers routinely run conflicts checks. The January 13, 2003 letter included the names of four persons who were likely to interact with the Respondent during the visit. A simple computer check of Supreme Court filings would have revealed that Rickey Calhoun and Andre Brigham Young had cases pending before the Supreme Court. By not doing so, Respondent created a situation where it was likely he would interact with these individuals.

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The Respondent raised the subject of "*volitional control*" with some of the residents during the tour. He introduced the topic at a time when the Justices were circulating draft opinions in *Thorell,* a case dealing with the "*volitional control*" issue. The subtle distinctions offered by the Respondent as a defense to his actions do not cure this lapse of judgment. It is reasonable that lawyers handling appeals that involve "*volitional control*" issues would have concerns about the Respondent's objectivity and impartiality based on this conduct.

The Respondent met with Charles Johnson, a litigant in the *Thorell* case. *In re Thorell* had been pending before the Court for several months. This was an appeal involving confinement issues for sexual predators. The Respondent was visiting an institution that confined convicted sexual predators. He should have realized that it was likely that he might interact with a litigant in that case, especially if he was going to inquire about "*volitional control.*" At a minimum, the Respondent, upon his arrival at the Center, should have inquired if the Superintendent or anyone on his staff had taken any action regarding his request that the residents be instructed about the limitations of the visit.

On two occasions during the visit, the Respondent accepted unknown material from two different residents. While he was testifying, the Respondent made a point of referring to SCC residents as "prisoners" and that he views the SCC as a prison. (Transcript p. 915) It is elementary that a visitor to a correctional facility should not accept packages or other material from an inmate. Even assuming such materials were involuntarily thrust upon him, the Respondent

should have immediately turned the documents over to the people responsible for running the institution. Instead, he took them to Olympia and filed them away in his office. Upon returning to Olympia, the Respondent made no initial effort to cure any of his mistakes. He took no further action until he learned that counsel in *Thorell* became aware of his conduct during the visit. On March 18, 2003, a Motion for Recusal was filed. A few days later on April 8, 2003, the Respondent was provided with the names of the residents with whom he interacted. Even with this notification of concern, the Respondent did not run a computer check of the names on the list to ascertain if there might be a problem.

The actions of the Respondent that are cited in the examples above violated the Code of Judicial Conduct. Specifically, this conduct violated Canon 1 by failing to enforce high standards of judicial conduct and also violated Canon 2(A) by failing to promote public confidence in the integrity and impartiality of the judiciary.

The Respondent takes the position that judges should visit correctional institutions and that he should not be disciplined because he took advantage of the opportunity to have an educational experience. He further offers as a defense the certification from the Mandatory Continuing Judicial Education Committee as proof he did nothing inappropriate.

This proceeding is not about whether judges should visit correctional institutions. The Commission strongly encourages judges to visit correctional institutions. Normally such undertakings are tours sponsored by judicial education organizations that make arrangements with the authorities

at the institution. If a tour is sponsored or originated by prisoners, prison rights advocates or other non-judicial groups, judges must be cognizant that they have a responsibility to exercise reasonable judgment in such an activity and anticipate potential conflicts and notify counsel when appropriate.

On any institutional visit (other than a court inspection pursuant to a specific case over which the judge is presiding), a reasonable judge:

- considers the likelihood that during such a tour, the judge will come into contact with inmates who presently have or are likely to have a matter pending before the judge. If such a likelihood exists, the judge establishes clear parameters of an institutional visit beforehand and notifies counsel when appropriate;

- avoids legal discussions with or accepting documents from inmates concerning legal matters while on a tour; and

- undertakes special efforts to notify the authorities and counsel if inadvertent interaction occurs between the judge and an inmate.

The Respondent's failure to exercise good judgment resulted in the ethical violations cited above. By not heeding the warnings of others and by not taking precautionary steps to ascertain if problems existed, the Respondent created legitimate concerns from counsel involved in certain cases

before the Court. The Respondent's testimony sums up his state of mind:

> Well, I believed that the prisoners at this facility would welcome a visit from a state Supreme Court justice to their facility or the Court to their facility. I didn't have any reason to believe that the staff would feel otherwise about it. Beyond that, I didn't —you know, I wasn't thinking about how everybody else in the world would think about it. (Transcript p.1004).

Finally, the Respondent claims that the complaints giving rise to this proceeding were brought by prosecutors who disagree with his judicial philosophy. He contends the complaints are politically motivated and therefore without merit. This argument is unfounded. The Statement of Charges in this proceeding was filed only after a thorough and independent investigation which included consideration of the Respondent's answers to the complaints.

FACTORS

Under both the Rules of the Commission and case law, there are ten non-exclusive factors the Commission must consider in determining the appropriate sanction for a violation of the Code of Judicial Conduct:

1. Whether the conduct was an isolated event or a part of a pattern of conduct.

The violations are all related to one event. The record reveals no pattern of conduct.

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2. The nature, extent and frequency of the occurrence of the acts of misconduct.

Although this was an isolated event, as noted above, there were several acts which gave rise to the violations.

3. Whether the misconduct occurred in or out of the courtroom.

The misconduct did not take place in a courtroom; however some of the lapses occurred in the Justice's chambers.

4. Whether the misconduct occurred in the Justice's official capacity or his private life.

All of the misconduct took place in the Justice's official capacity.

5. Whether the Justice has acknowledged or recognized that the acts occurred.

The Justice does not acknowledge or recognize that his actions were inappropriate. Even though he was warned by other Supreme Court justices and has recused himself from a significant Supreme Court case, he remains insensitive to the perceptions of others in the legal community and the general public. His position is that he knows when he is influenced by something and only then does it matter. He also attempts to divert the blame for his conduct by contending that he is a political victim of lawyers who do not share his judicial philosophy. The Respondent's testimony is revealing in that regard. During his testimony, the

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Respondent was asked if he was concerned with how lawyers perceive his conduct:

> Q. Are you concerned with how lawyers see your actions as the—
>
> A. I am concerned with the activities of certain lawyers. I don't think that lawyers have any misconception about what this tour was about and how the tour was conducted. I don't think that any lawyer, any lawyer, who has testified here or hasn't testified here, ever thought for a second that anything I did on any of these — that anything I did or heard or saw during the course of this tour would ever influence my decision on any case that came before me, not Mr. Hackett, not Mr. Bowers, not Mr. Norm Maleng, not any of them.
>
> Q. And that's really the issue for you, isn't it?
>
> A. It's the issue for them. (Transcript p. 1052).

A follow up question from another Commissioner:

> Q. Now, I'd like to read a sentence from the preamble to the Code of Judicial Conduct. It says, "Intrinsic to all sections of this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system." Now how do you reconcile what you said, that it's not an issue for

you on these perceptions, but its an issue for them, and how do you reconcile that with what's stated in the preamble of the Code of Judicial Conduct?

A. Well, this requires a little further explanation. An issue for me would be prejudging a case, an issue for me would be engaging in activity contrary to the code or otherwise which would lead to a legitimate perception that I was less than impartial and that I could not be trusted as a judge to perform my duties impartially. I do not believe that the people that are complaining about this visit had any effect whatsoever on my views about how to adjudicate these cases. I think their agenda is a completely different one. (Transcript p. 1080)

Other testimony in response to a question from a Commissioner at the end of the proceeding:

Q. Thank you. One last question from me. I know that you have read the canons before the proceeding. Do you today believe that you have an affirmative duty to avoid the perception of impropriety as a Supreme Court justice, sir?

A. Yes, but then again, what is the perception of impropriety and what is the basis for that perception? I would hope that the perception would be based upon a full knowledge of the facts and the law, because there's a lot of people out there in society that think things are improper because they really don't understand what it's all about, and there's different points of view, so I just try to do the best I can. (Transcript p. 1068)

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6. Whether the Justice has evidenced an effort to change or modify his conduct.

As noted in 5 above, the Respondent does not recognize any problems with his conduct, thus it is unknown if the Respondent would repeat similar conduct in the future.

7. The Justice's length of service on the bench.

The Respondent has been a Supreme Court Justice since January 1996.

8. Whether there have been prior complaints against the Justice.

There have been no prior sustained complaints against the Respondent.

9. The effect the misconduct has upon the Integrity of and respect for the judiciary.

With the exception of the Respondent's former law clerk, all of the lawyers who testified expressed concern about the Respondent's conduct. It is further evidenced by recusal motions filed against the Respondent by Snohomish County prosecutors. A state Supreme Court Justice is expected to be a model citizen. The expectations of lawyers are similar, especially those who practice before the Court, i.e., justices of the Supreme Court should be model jurists. The actions of the Respondent and his refusal to acknowledge the perceptions of others in the legal community reflect poorly on the Supreme Court and the judiciary in general.

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10. The extent to which the Justice exploited his position to satisfy personal desires.

There is no evidence in the record to show that the Respondent exploited his position for personal desires.

SANCTION

Considering all of the factors above, the Commission must determine an appropriate sanction. The Commission concludes that admonishment is appropriate for this first violation of the Code of Judicial Conduct. Further, consistent with RCW 4.12.040, the Respondent is encouraged to exercise utmost caution in considering his involvement in matters concerning the issue of volitional control presented by sexual predators residing at the Special Commitment Center.

Dated as of the 27th day of May, 2005.

s/ Gregory R. Dallaire
Gregory R. Dallaire

s/ Betsy L. Wilkerson
Betsy L. Wilkerson

s/ Josephine Townsend
Josephine Townsend

s/ Harold D. Clarke, III
Harold D. Clarke, III

s/ Wanda L. Briggs
Wanda L. Briggs

s/ Judith E. Fortier
Judith E. Fortier

s/ Marianne Connelly
Marianne Connelly

APPENDIX C — MINORITY OPINION DATED MARCH 22, 2005 AND FILED APRIL 8, 2005

BEFORE THE COMMISSION ON JUDICIAL CONDUCT OF THE STATE OF WASHINGTON

No. 4072-F-109

In re the Matter of

RICHARD B. SANDERS, Justice,
Washington Supreme Court

MINORITY OPINION

We agree with the majorities' Finding of Fact in this case. We do not agree these circumstances warrant any sanctions for Justice Sanders.

The preamble to the CJC reads in part as follows:

> "It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether the activity was inadvertent, unintentional or based on a reasonable but mistaken interpretation of obligations under the Code, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system".

Here it is unlikely that Justice Sanders' actions have created a general public perception that he would not be impartial in cases involving the SCC. The crux of the problem is that he personally met with persons who were likely to have cases before him and asked some of them to make comments *related* to a legal issue pending before his court This conduct was inappropriate and would raise reasonable concerns for the attorneys involved in these cases. On the other hand, there is no indication that Justice Sanders solicited or received comments *directly* on the legal issues before the Supreme Court or that Justice Sanders' position on Supreme Court cases was affected by his visit.[1]

Thus, we would find that Justice Sanders' conduct in this case was inappropriate consistent with the majorities' findings. However, we recognize that Judges are and should be encouraged to visit institutions and that little in the way of ethical guidelines have been available for such visits. We also recognize that Justice Sanders' mistakes here were arguably minimal. We would therefore not support any sanctions for this conduct.

Dated this 22 day of March, 2005.

s/ Joel Penoyar
Joel Penoyar

s/ Antonio P. Cube, Sr.
Antonio P. Cube, Sr.

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1. Justice Sanders also unexpectedly received written materials from inmates. These documents should have been returned to prison staff. If they weren't returned, Justice Sanders should have reviewed them or had them reviewed so that he could make appropriate disclosure to any counsel involved.

APPENDIX D — DISSENT DATED MARCH 11, 2005

BEFORE THE COMMISSION ON JUDICIAL CONDUCT OF THE STATE OF WASHINGTON

No. 4072-F-109

In re the Matter of

RICHARD B. SANDERS, Justice,
Washington Supreme Court

DISSENT

We agree with the Findings of Fact set forth in the Majority Opinion.

However, the majority overlooks and does not set forth certain other facts that are of great importance in arriving at a decision in this matter.

Justice Richard Sanders is charged with having improper *ex parte* contacts with residents at Washington's Special Commitment Center (SCC) and creating an appearance of impropriety by doing so.

It is important to keep in mind that the burden is placed upon the Commission on Judicial Conduct to prove a violation of the Code of Judicial Conduct by "clear, cogent and convincing" evidence. The record here falls far short of this standard. On the contrary, the evidence shows that Justice Sanders appropriately addressed all issues of *ex parte* contact as they arose.

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In response to the Commission Decision, we consider the following facts:

On January 23, 2003 Justice Sanders wrote the superintendent of SCC a letter (Exhibit 215) (see Commission Decision page 4) setting forth the "ground rule" regarding any discussions with residents of the facility.

Prior to the tour, concerns were raised by members of the Supreme Court about Justice Sanders going on the tour. Chief Justice Alexander, in a conversation with Justice Sanders, testified:

> I indicated to him that I did not intend to go personally. . . . And then I indicated to him that I felt that there were elements in the legal profession and in the law enforcement community that were not kindly disposed to Justice Sanders, and I felt that his activities would be more closely scrutinized than other justices, and I thought I should let him know that I had that belief, but that ultimately, it was his decision. (Testimony page 203)

Disciplinary counsel, in cross-examination of Justice Sanders, asked:

> Chief Justice Alexander testified that he spoke to you and he warned you that going on this tour would be problematic for you specifically. And do you recall him saying that to you, that this would be problematic for you, Justice Sanders?

Justice Sanders replied:

> I think that Justice Alexander said, 'People are gunning for you, Justice Sanders.' That's the reason it would be problematic for me rather than other justices.

This question then followed: "And forgive me, but what was your reaction to that?" Justice Sanders answered:

> You know, I can't let others determine when I go on or don't go on a tour, . . . I have to be responsible for my own conduct and if some want to go after me, I simply can't live in a life of fear. I have to do what I think is right. (Testimony page 1064)

Alan McLaughlin, a staff member at SCC, accompanied the visitors on the tour and later made notes of what occurred during the tour. He testified:

> Justice Sanders introduced himself. He indicated that he was here to tour and to hear about the facility, he was interested in hearing their reactions to living in the facility. He prefaced that he would like to hear a little bit about what got them to the facility and where they were within the treatment process at the facility and their thoughts about it.

Mr. McLaughlin was then asked whether Justice Sanders gave any warnings at the beginning. Mr. McLaughlin responded:

> Yeah, actually, and then as he went on, he indicated that he wouldn't go into their personal lives and personal issues as there is a possibility that if he did and had [gone] into that too far for information, that he may have to recuse himself from their cases if their cases ever came before him. . . . That was really right at the beginning. . . . Actually, he said that a number of times throughout the course of those meetings of the residents in the classroom. (Testimony pages 405-406)

Sometime before the tour, Mr. McLaughlin had a conversation with Tim Lang, of the Attorney General's Office, and with David Hackett, of the King County Prosecuting Attorney's Office. During those conversations it was suggested that Mr. McLaughlin take notes, or reduce his observations to writing.

In e-mail messages prior to the tour, Mr. Hackett received this question from one Ms. Sappington: "What's wrong with someone from defense and prosecution going?" Mr. Hackett replied:

> If we send attorneys with Sanders, then it is no longer an *ex parte* tour of questionable purpose but a legitimized tour where the attorneys were present. I think it also smacks of interference and

> looks like we are keeping an eye (on) him. He's already paranoid. Why make it worse? I'd send him around with some slick media guy and serve him lunch in the inmate kitchen. (Testimony pages 829-830)

It is also interesting to note that, upon cross-examination of Justice Sanders, disciplinary counsel elicited from him that Bernie Friedman, a state attorney, had signed up for the tour, and in a subsequent conversation Mr. Friedman told Justice Sanders that "his superiors had waived him off." (Although this was later objected to by disciplinary counsel, and sustained by the chair, it is a matter opened up by the commission on cross-examination.) (Testimony pages 1110-1111)

With regard to the materials that were handed to Justice Sanders by unknown residents—he took them to his chambers, glanced at one of them, and placed them in a file. They had nothing to do with any matter before the court.

Subsequent to the tour, a complaint was filed with the Commission on Judicial Conduct by the King County Prosecuting Attorney, and a motion to recuse was filed by the Snohomish County Prosecuting Attorney. Justice Sanders did, in fact, recuse himself from a matter that was then pending in the Supreme Court.

It should be noted that Justice Sanders did not know any of the residents of SCC, any of their names, or that any of those he visited with had matters before the Supreme Court.

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The Commission, in its decision, is critical of Justice Sanders's "refusal to acknowledge the perceptions of lawyers who practice before the Supreme Court on this issue and his belief that there is a political agenda underlying their concerns" because he does not believe he violated the Code of Judicial Conduct. We cannot find fault with his so called refusal.

Judges are encouraged to visit state institutions to become educated about the legal system and to seek improvements to that system, as well as to improve themselves, and they are given continuing judicial credit for such tours.

In light of the Commission Decision, any judicial officer who hereafter visits a state institution does so at his or her peril and, in fact, may be violating the provisions of the Code of Judicial Conduct.

Justice Sanders did not violate any provision of the Code, and it is unfortunate that he has been subjected to the ordeal of being placed "on trial" for performing a proper judicial function.

We would dismiss the complaint, upon finding no violation of the Code of Judicial Conduct.

Dated this 11th day of March, 2005

s/ John A. Schultheis
John A. Schultheis

s/ Mike Sotelo
Mike Sotelo

APPENDIX E — ORDER OF THE SUPREME COURT OF WASHINGTON DENYING MOTION FOR RECONSIDERATION DATED AND FILED MARCH 7, 2007

THE SUPREME COURT OF WASHINGTON

NO. 200,271-4

In the Matter of the Disciplinary Proceeding
Against

RICHARD B. SANDERS,

Justice of the Supreme Court of the State of Washington.

ORDER DENYING MOTION FOR RECONSIDERATION

Justice Richard B. Sanders has filed a motion for reconsideration herein. The Court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED at Olympia, Washington this 7th day of March, 2007.

For the Court:

s/ [illegible]
CHIEF JUSTICE PRO TEMPORE

APPENDIX F — EXCERPT FROM JUSTICE SANDERS' HEARING MEMORANDUM TO THE WASHINGTON COMMISSION ON JUDICIAL CONDUCT

* * *

CJC 3(A)(4) Is Overbroad and Void for Vagueness: Under the 1st and 14th Amendment to Constitution of the United States and applicable Washington Constitutional provisions, CJC 3(A)(4), as it is being applied in this case is unconstitutional:

> A statute is void for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Luvene*, 118 Wn.2d at 844 (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A vagueness challenge is rooted in principles of due process: "the need to define prohibited conduct with sufficient specificity to put citizens on notice of what conduct they must avoid, and the need to prevent arbitrary and discriminatory law enforcement." *Id.* (citing *Webster*, 115 Wn.2d at 642-43; *State v. Smith*, 111 Wn.2d 1, 4-5, 759 P.2d 372 (1988)).

State v. Glas, 147 Wn.2d 410, 421 (2002).

A statue is overbroad "[I]f it sweeps within its prohibitions constitutionally protected free speech activities." *City of Seattle V. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990).

In this case a person of common intelligence would have to guess that it was a violation of the Canon to visit the Center.

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There is no way from the face of the Canon to know that having discussions with prisoners who were not known to the Justice who may have had cases he did not know about in the court system would be considered a violation of CJC 3(A)(4). Furthennore, Justice Sanders has a free speech right to discuss matters with the prisoners under the circumstances of this case. CJC 3(A)(4) cannot be applied to him in this case since such application is unconstitutional.

* * * *

APPENDIX G — EXCERPT FROM JUSTICE SANDERS' NOTICE OF CONTEST TO THE WASHINGTON STATE SUPREME COURT

* * *

Justice Sanders contests the denial of his Challenge for Cause and preserves for argument on appeal the issues raised by him in the Challenge for Cause including but not limited to the lack of impartiality of the Commission members, the refusal of the Commission to answer questions concerning Commission members including what documents concerning Justice Sanders the Commission members had already seen prior to the Statement of Charges being filed and the refusal to recuse when those documents were not provided.

(h) Justice Sanders specifically preserves for argument on appeal the issue raised in the Challenge for Cause concerning the validity of the process by which the Commission conducts its business including but not limited to the validity of a system which allowed the Commission members to receive secret information including facts and legal argument concerning Justice Sanders and to then sit in judgment without disclosing the information received.

(i) Justice Sanders specifically preserves for appeal the validity of the Washington "one tier" system of judicial discipline. This issue was raised in connection with the Challenge for Cause, in Justice Sanders' Answer to Statement of Charges and during the proceedings.

(j) Justice Sanders specifically preserves for appeal the constitutionality under both the State and Federal Constitution of the CJC provisions he was found to have

violated as well as the constitutional failure of Commission procedures. These issues are raised by the Amended Commission Decision including the references to CJC sections allegedly violated, the procedural steps referenced in the Amended Commission Decision and otherwise reflected in the files and records in this matter. The constitutional arguments preserved include but are not limited to the lack of due process, the lack of equal protection, the failure to provide fair notice, restraints on free speech and restraints on freedom of association.

* * * *

APPENDIX H — EXCERPT FROM JUSTICE SANDERS' OPENING BRIEF TO THE WASHINGTON STATE SUPREME COURT

* * *

2. JUSTICE SANDERS WAS DENIED DUE PROCESS

In this proceeding, Justice Sanders was denied due process under the Fourteenth Amendment to the United States Constitution and Art. 1, § 3 of the Washington State Constitution.

(a). Canons 1 and 2(A) Are Void for Vagueness: Canons 1 and 2(A) as applied by the Commission in this case was overbroad and resulted in a sanction based on an unconstitutionally vague rule.

> To withstand a vagueness challenge, the canon must give adequate notice of prohibited activities. "Adequate notice requires the law to be sufficiently definite so that a person of ordinary intelligence can reasonably tell what is prohibited." (Citing *American Dog Owners Ass'n v. Yakima*, 113 Wn.2d 213, 215, 777 P.2d 1046 (1989)).

In re Blauvelt, 115 Wn.2d 735, 741, 801 P.2d 235 (1990). Neither Canons 1 or 2(A) provide any definition so that a person of ordinary intelligence can reasonably tell what is "prohibited." The result is imposition of an "implied" violation. This is exactly what the court cautioned against in *Discipline of Stoker*, 118 Wn.2d 782, 799, 827 P.2d 986 (1992):

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While we must hold judges and judicial candidates to the highest standards of conduct, we must, at the same time, avoid, without a clear factual basis, reading into proper conduct "implied" results which constitute violations of the Code of Judicial Conduct.

* * * *

APPENDIX I — SECOND EXCERPT FROM JUSTICE SANDERS' OPENING BRIEF TO THE WASHINGTON STATE SUPREME COURT

* * *

Due process challenges to the one-tier system have largely been denied. *See Keiser v. Bell*, 332 F. Supp. 608 (E.D. Pa. 1971); *Roy v. Jones*, 349 F. Supp. 315 (W.D. Pa. 1972); *In re Brown*, 512 S.W.2d 217 (Tex. 1974). However, all these cases as well as the cases following them provide that while the "mere" showing that the investigatory and adjudicatory functions are combined is not per se a denial of due process where it can be shown that this combination resulted in the risk of actual bias, it would be a denial of due process: In its only pronouncement on the "one-tier" system, *In re Deming*, '08 Wn.2d 82, 106 - 107, 736 P.2d 639 (1987), the court stated with approval "Last, the investigation and prosecution of this case was conducted by staff personnel who should not participate in the decision making process and who, from the record, did not do so." The court went on to state "The record supports the conclusion that here the adjudicator function was separated from the investigatory and prosecutorial function." The record does not do so in Justice Sanders' case.

* * * *

APPENDIX J — EXCERPT FROM THE BRIEF OF AMICUS CURIAE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON TO THE WASHINGTON STATE SUPREME COURT

* * *

IV. ARGUMENT

A. Canons 1 and 2(a) Infringe on Speech and Association Rights.

The United States Constitution guarantees the right of an individual to free speech. *See* U.S. Const. amend. I. Similarly, Washington's Constitution guarantees that "[e]very person may freely speak, write and publish on all subjects." Wash. Const. art. I, § 5. These guarantees embody "'our profound national commitment to the free exchange of ideas.'" *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (quoting *Harte-Hanks Commc'ns Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S.Ct. 2628, 105 L.Ed.2d 562 (1989)). Closely associated with the right of speech are rights of assembly and association. *De Jonge* v. *Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937). "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ." *Nat'l Assn for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (citations omitted).

* * * *

APPENDIX K — EXCERPT FROM JUSTICE SANDERS' ANSWER TO THE BRIEF OF AMICUS CURIAE TO THE WASHINGTON STATE SUPREME COURT

* * *

The free speech issue is a natural extension of the vagueness issue, since it is raised in the pleadings below and in the Notice of Contest. A part of the free speech argument is that Canons 1 and 2(A) are indeed vague as to free speech restraints. Judges are not free from restraints on their speech but such restraints must be clearly defined. *Discipline of Sanders*, 135 Wn.2d 175, 189, 955 P.2d 369 (1998). Here, as argued by the amicus curiae, Canons 1 and 2(A) do not provide a justice with the clearly defined strictures required for a restraint on speech and, therefore, they are unconstitutionally vague.

Since the issues of vagueness and free speech have been in this case from the beginning, were reserved in the Notice of Contest and are either directly argued by Justice Sanders in his briefing or are a logical extension of his arguments, the arguments of the amicus curiae should be accepted and considered by this court. The opportunity for the Commission to respond to these matters and present contrary authority is found in the answer it is authorized to file in response to the amicus curiae.

* * * *

(2)

No. 06-1629

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

THE HONORABLE RICHARD B. SANDERS,

Petitioner,

v.

THE WASHINGTON STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTIONS PRESENTED

1. Judges Are Properly Held to an Enforceable Standard to Avoid the Appearance of Impropriety.

2. Canons 1 and 2(A) of the Washington Code of Judicial Conduct Are Not Vague or Unconstitutional.

3. Justice Sanders' First Amendment Rights Were Not Violated When He Was Disciplined for Meeting and Conversing With Incarcerated Sexual Predators Who Had Cases Pending Before Justice Sanders' Own Court.

4. The "One-Tier" Judicial Disciplinary System Does Not Violate Due Process Rights.

5. The Washington Commission's Rules Governing Discovery Afford Complete and Reasonable Discovery to Respondent Judges, and Justice Sanders had Full Benefit of those Rules and the Opportunity to Challenge the Hearing Panel for Cause.

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STATEMENT OF FACTS

In a letter dated December 17, 2002, Andre Young, a resident of the Special Commitment Center (hereinafter SCC) for people adjudicated to be Sexually Violent Predators, invited, on behalf of the African American Collective,[1] Justice Sanders and the other justices of the Washington State Supreme Court to visit the institution. At the time, Mr. Young had a case pending before the State Supreme Court. His expressed desire in the invitation was for the justices to "evaluate and calculate" the statute confining sexually violent predators at the SCC by conducting "an on-site tour of the facility [and] to converse with the residents and Staff." The manner in which the tour was proposed and its anticipated nature caused concerns for other justices that they shared with Justice Sanders. One justice, Mary Fairhurst, was immediately worried about "the appearance that a request was coming directly from the residents to the Supreme Court and to me specifically to tour the facilities and meet with them." Chief Justice Gerry Alexander noticed that the letter was signed by Andre Young, "a name that's known to us because of other litigation that this individual had before the Court." A third justice, Faith Ireland, on January 7, 2003, emailed her colleagues on the bench, that an appropriate tour should be set up by the superintendent of the facility, rather than dealing directly with the residents. The Chief Justice testified that he shared that concern.

On January 9, 2003, at the justices' monthly administrative meeting, they discussed the proposed tour. It was eventually decided that there was a way to conduct a visit

[1] A self-named association of residents of the SCC.

without causing concerns. In light of that decision, Justices Fairhurst and Ireland, both veterans of many institutional tours, expressed interest in participating in the visit. On January 10, 2003, Justice Ireland wrote the SCC Superintendent advising him she intended to join Justice Sanders on the tour and asked him to make plain to the residents that she was not there to evaluate the facility. She sent a copy of her letter to Justice Sanders and to Mr. Young.

Unknown to the other justices, Justice Sanders had received another letter directly from Andre Young dated January 9, 2003, thanking him for his "recent response accepting the African American Collective's invitation to visit" and to tour the SCC. Mr. Young's letter discussed at length the fact-finding the African American Collective was proposing for the visit. He attached copies of legal documents from a federal court action that included another resident, Ron Peterson, as a plaintiff. In his January 9, 2003 letter, Mr. Young suggested that Justice Sanders contact "opposing counsels" to be in attendance because "we do not want the appearance of partiality, nor are we about making ex parte legal actions and not otherwise informing the prosecution e.g. SCC Administration are renowned for their surreptitious adversarial/ prosecutorial actions towards us."

Justice Sanders had written two opinions in cases brought by Ron Petersen. Mr. Petersen had two matters pending in the Washington Supreme Court, wherein he raised the issue of "volitional control," conditions of confinement, and other issues. Justice Sanders acted on one of these matters while on Department One of the Court.

By letter dated January 13, 2003, Andre Young again wrote to Justice Sanders, outlining the tour the African

American Collective was proposing, including sites to be visited and naming residents who would serve as guides. One was resident Rickey Calhoun, who had an active petition for review in the Supreme Court at the time. Justice Sanders testified that he recalled receiving correspondence from Mr. Calhoun. Mr. Young also attached the Report of the Ombudsman, challenging the constitutional adequacy of the SCC, and documents from Mr. Peterson's matter pending in federal court.

"Red flags" went up for Chief Justice Alexander when he saw this letter because of Mr. Young's expectations for the tour. At that time, the Chief Justice talked to the other justices who were planning to visit the institution, including Justice Sanders, to express his concern and the apparent misapprehension the residents had about how the tour would be conducted. Although Chief Justice Alexander did not consider it his role to tell other justices what to do, he frankly advised Justice Sanders that he was "not going to be going and that [his] clerks would not be going, and that [he] was concerned that there may have been a misunderstanding on the part of Andre Brigham Young."

When Justice Fairhurst received a copy of Andre Young's January 13, 2003 letter, she, too, decided it would be imprudent to go on the tour. She wrote a memorandum to Justice Sanders on January 21, 2003, copied to the Chief and Justice Ireland, attaching a printout of 23 cases brought by Mr. Young, (not including current cases) to illustrate the reasons for her concerns.

Justice Ireland declined Justice Sanders' further preparatory invitation to meet with the former SCC Ombudsman "to provide background and stat[e] what [the Ombudsman's] position was," because she felt it would be

improper "ex parte contact" about complaints that would come to the Court in "some kind of a PRP [personal restraint petition]. . . ." On January 22, 2003, after receiving Andre Young's January 13, 2003 letter and attachments, Justice Ireland wrote the Superintendent of the SCC directly and announced her decision not to go. Justice Ireland sent copies to the other justices, citing the anticipated contact with residents because such "conversation with inmates could be construed as *ex parte* communication" due to the "volume of litigation the residents" had in the Supreme Court.

Justice Ireland had two different conversations with Justice Sanders warning him directly that the planned visit was imprudent, given the residents' expectations. She testified that in the second conversation about "whether the trip should be made and, again, in the same sort of thing across the table from one another where I said, 'Richard, don't do this,' and it was, you know, I was saying, making a warning statement to him, 'don't do this,' and, you know, 'this is a mistake' . . . " In addition, Justice Sanders' own law clerk who handled sexual violent predator (SVP) cases questioned him about the propriety of the visit as planned.

Two business days before the tour, the Superintendent faxed a letter to the Chief Justice, copied to Justice Sanders, suggesting that some of the residents whom Justice Sanders might contact " . . . have cases pending in the state court system" and inquiring if the Court wished the institution to follow any particular "protocol." Justice Sanders responded to the Superintendent (and copied the Chief) with his first letter showing any concern on his part that there should be limits on the tour he had arranged at the behest of the African American Collective. In a portion of that letter (not cited in his petition), Justice Sanders

told the Superintendent that his visits with the residents would be a "highlight" of the tour. In the end, Justice Sanders was the only justice to go on this tour, together with his own and several other law clerks from the Court.

Once at the SCC, Justice Sanders reiterated his desire to meet and speak with its residents. Although in his petition Justice Sanders correctly states that the staff "placed Justice Sanders in a conference room where he met with groups of residents," he did not note to this Court that the staff's testimony was that they did so *only* because of Justice Sanders' repeated requests to have conversations with the residents. SCC staff also testified that they had not set up such encounters with any other judge touring the facility in the past. Moreover, Justice Sanders' petition omits to mention that he accepted without question documents proffered him by two residents, removed them from the facility, and failed to disclose their existence or contents until required to do so.

Justice Sanders accurately recites how, in his letter to the Superintendent, he stated the need to set conversational limits in his meetings with the members of the SCC. Justice Sanders also accurately states how he told residents face to face not to discuss their cases lest he be required to recuse himself from related litigation. Nevertheless, despite the cautionary statements, Justice Sanders then immediately crossed the lines he had himself defined in his conversations with SCC members. As the residents introduced themselves, (many of whom had cases currently pending before the State Supreme Court), Justice Sanders initiated one-on-one conversations on their views of "the issue of volitional control," an issue central to a major case pending before his Court. He also asked them about facts crucial to decisions in many of

their individual cases. Even if not anticipated beforehand, the nature of these contacts far exceeded the appropriate conduct for judicial institutional visits.

Despite these interactions with litigants at the SCC, after returning from the tour Justice Sanders took no initiative to disclose to parties or their attorneys what conversations he had had with the litigants, nor did he disclose the documents that he had received from them. Although Justice Sanders did eventually recuse himself from the *Thorell* case (*In re Thorell*, 149 Wn.2d 724, 72 P.3d 709 (2003)), involving the SCC and the issue of volitional control, he did not do so until the State moved for his recusal and after Justice Sanders had sought and received an opinion from the state Ethics Advisory Committee that he was obliged to do so.

The facts in this case are largely uncontested and, for the most part, they are accurately set forth in the petition to this Court. There are, however, several significant omissions and at least one unsupported suggestion of malfeasance in the statement of facts offered in support of the petition to this Court. The Commission on Judicial Conduct has stressed, from the beginning of the instant disciplinary process, that it was not concerned with the bare fact that a judicial officer visited a state institution in which people are involuntarily detained. The pro tem State Supreme Court reiterated this point after *de novo* review. It is the context and circumstances of the visit and Justice Sanders' actions while there that form the gravamen for discipline.

REASONS TO DENY THE PETITION

Judges Are Properly Held to an Enforceable Standard to Avoid the Appearance of Impropriety.

The case before the Court presents a straightforward application of well-established principles of judicial ethics law. Justice Sanders' petition misstates the case as a vehicle for consideration of "decades-long conflicts in case law," and further misstates the Washington State Supreme Court decision as one "inconsistent with this Court's established precedent." Pet. for Cert. 8. The facts of this case do *not* present a clash between Justice Sanders' First Amendment rights and the judicial impropriety prohibited by the Code. Justice Sanders suggests that national judicial discipline jurisprudence is at a turning point in the application of the appearance of impropriety: it is not. At page 9 of his petition, Justice Sanders wrongly describes the Model Code recently adopted by the American Bar Association as containing "an expanded version of the appearance of impropriety standard [that] transforms it from a hortatory standard into a rule that is the basis for discipline." In the following footnote, the petition goes on to misstate that the "former CJC made clear that Canons 1 and 2 were aspirational, not mandatory." The petition urges this Court to accept certiorari to avoid a purported fundamental change in the application of the Code. At page 9 of his Petition, Justice Sanders misleadingly portrays the issue as it was discussed at the recent American Bar Association conference. At the ABA Convention in February 2007, an eleventh-hour effort was made to radically change the Model Code by making the appearance of impropriety unenforceable for the first time. This eleventh-hour attempt to undo years of precedence created serious consternation and resulted in the resignation of an advisory member of the Committee reviewing the Code as a protest

against the attempted undermining of the Model Code. In reaction to the attempt to make the appearance of impropriety unenforceable, the *New York Times* newspaper published a strongly worded editorial, and the national Conference of Chief Justices, among other organizations, passed a formal resolution opposing the abandonment of the standard. In the end, the ABA retained the appearance of impropriety as an enforceable standard. *See* Appendix A.

In the instant case, far from creating a new imposition on the rights of the judiciary, the Washington State Supreme Court's decision and that of the Commission created no new law and imposed no startling restrictions on a judge's rights or obligations. Rather, they simply reaffirmed a fundamental and non-controversial premise of judicial integrity: judges have an affirmative duty to be vigilant to guard against the appearance of impropriety in their role as neutral arbiters of disputes before them. *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Determination of the appearance of impropriety in this case, as in *Liljeberg*, turns on a consideration of the facts. 486 U.S. at 852. Justice Sanders' petition urges this Court to misapprehend the history of the appearance of impropriety. At page 13 of his petition, Justice Sanders writes: "Prior to this case, there were no Washington cases finding a Canon 1 violation standing alone." The Commission made no such finding in this case or in any other. The Commission found Justice Sanders violated Canon 1 *and* Canon 2(A). Contrary to the statement in the petition at page eight, Canons 1 and 2(A) *have* historically been enforced absent a finding of a more specific code provision, as demonstrated in Washington and other states. *In re Votendahl*, 89-879-F-17 (1990), *In re Coughenour*, 91-1063-F-24 (1991), *In re Leverette*, 91-1118-F-26 (1991), *In re Perkins,* 93-1474-F-42 (1993), *In re Hatter,*

93-1445-F-46 (1994), *In re Mackin,* 94-1677-F-49 (1995), *In re Turco,* 97-2451-F-66 (1998), *In re Ritchie,* 91-1110-F-33 (1993), *In re Bridge,* 4050-F-106 (2003), *In re Vanderveen,* 4793-F-122 (2005), *In re White,* 4792-F-121 (2005) (all Washington cases can be viewed at the website: www.cjc.state.wa.us); and from other states, *In re Hill,* 8 S.W.3d 578 (Missouri 2000), *In re Schenck*, 318 Ore. 402, 870 P.2d 185 (1994), *In the Matter of Pastrick*, New York, August 2005 (can be viewed at the website: http://www.scjc.state.ny.us/). *See* Appendix B for a law review article discussing many such cases from around the country: Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. Ark. Little Rock L. Rev. 64 (2005).

The Commission was required, in this case and in others that have (and will) come before it, to apply the Canons of Judicial Conduct to the manner in which judges conduct themselves, so as to insure the integrity and independence of the judiciary and the public's faith in it. Definitions and standards for conduct are developed in the context of particular factual situations. Canons 1 and 2, in particular, address the ethical aspirations expressed by the Code of Judicial Conduct. Although Justice Sanders suggests that the Canons have no independent validity, they are critical to the constitutional mandate of the Commission. The Code is not a criminal code with specific elements noted for every potential judicial transgression, but a largely aspirational document, directing judges to achieve and maintain standards of behavior. As stated in the last sentence of the Preamble, "[t]he Code is intended . . . to state basic standards which should govern the conduct of judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct." It is to be applied with a rule of reason, to be

interpreted in the light of experience, not only to maintain the actuality of judicial propriety but also the appearance of propriety. The goal is to maintain citizens' confidence in the independence and integrity of the judiciary. This is one of the reasons why non-law-trained members sit on the Commission and apply their experience and common sense along with other members who are judges and lawyers. In part, because the Code is aspirational and general, and not Napoleonic, an understanding of the specific facts of a case is essential to the Commission's charge.

Canons 1 and 2(A) of the Washington Code of Judicial Conduct Are Not Vague or Unconstitutional.

The argument that Canons 1 and 2(A) are unconstitutionally vague as applied to the facts in this case was raised by Justice Sanders before the Washington Supreme Court in its *de novo* review of this matter. The Commission adopts by reference the holding and the reasoning of the Washington Supreme Court in rejecting the argument. *In re Sanders*, 159 Wn.2d 517, 523-26, 145 P.3d 1208, 1211-13 (2006) (*Sanders II*) (Appendix A to Petition, pp. 6a-8a). The Washington Supreme Court considered the same claim that Canons 1 and 2(A) are too vague – more than a decade ago – and refuted it in *In re Ritchie*, 123 Wn.2d 725, 735, 870 P.2d 967, 972 (1994). The *Sanders II* court, (composed of many of the same pro tem justices who decided Justice Sanders' earlier case before the Commission, *In re Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998) (*Sanders I*), including the primary author of *Sanders II*) specifically contrasted the facts in *Sanders II* with its analysis in *Sanders I*, noting that *Sanders I* squarely presented the balancing of the justice's First Amendment rights against the Code of Judicial Conduct, whereas the facts in the instant case did not.

General disciplinary rules are inherent in various codes of conduct for professionals, and reflect the responsibility that such professionals owe to the public who rely upon them. Such general rules are essential because it would be impossible to codify every conceivable act that would be deemed to be improper. The entire body of the Code of Judicial Conduct is directed by the premier and compelling ethical precepts governing a judge's behavior articulated in Canons 1 and 2(A) – the obligation to uphold and promote public confidence in the integrity, independence and impartiality of the judiciary, and to avoid even the appearance of impropriety.

In a passage apposite to Justice Sanders' claim that the canons at issue are void for vagueness, this Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), specifically addressed the efficacy of a conduct code that gave fair notice of disciplinable behavior without having to spell out in detail every conceivable factual possibility. In *Arnett*, this Court upheld the term "for cause" against a vagueness challenge in relation to the discharge of a federal employee. Quoting from the Court's earlier decision in *Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court stated: "There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." 416 U.S. at 159, quoting from 413 U.S. at 578-79.

The essential fairness of this broad and general removal standard, and the impracticability of greater specificity, were recognized by Judge Leventhal, writing

for a panel of the United States Court of Appeals for the District of Columbia Circuit in *Meehan v. Macy,* 129 U.S. App. D.C. 217, 230, 392 F.2d 822, 835 (1968), aff'd *en banc*, 138 U.S. App. D.C. 41, 425 F.2d 472 (1969): "[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.'"

Justice Sanders takes the remarkable position that Canons 1 and 2 serve no compelling state interest, and he urges this Court to find Canons 1 and 2, the core of the Code of Judicial Conduct, unenforceable in the name of free speech. He argues this based on facts that offer no harbor for such argument. He places the issue before this tribunal (in more than passing reference) for the first time over the course of exhaustive litigation. He asks this Court to find that his First Amendment rights have been chilled because, in the absence of an independent basis for finding a violation of the Code of Judicial Conduct, Canon 1 is merely "hortatory." This argument was only obliquely noted to the Commission and to the Washington State Supreme Court in the lengthy course of this litigation. The record contains no argument of this issue applied to the facts of the case. Consequently, because it was never squarely brought up by Justice Sanders before the Commission or the highest court in Washington State, they have not even addressed the fundamental federal question Justice Sanders asks this court to decide. Justice Sanders has, essentially, based his contention in *this matter* on his *first* disciplinary proceeding, *Sanders I,* in which the Washington Supreme Court tipped the scales in favor of political free speech in a fact pattern that was appropriate to that issue.

Essentially, the factual support for Justice Sanders' contention that he was disciplined for exercising free speech rests merely on his assertion that it was so. However, the *mere assertion* that Justice Sanders was engaged in exercising constitutionally protected speech in the case at bar does not make it so.

Justice Sanders' First Amendment Rights Were Not Violated When He Was Disciplined for Meeting and Conversing With Incarcerated Sexual Predators Who Had Cases Pending Before Justice Sanders' Own Court.

This Court may one day be presented with a case highlighting the tensions between a judge's First Amendment rights and the restrictions imposed by the Code of Judicial Conduct. However, this is not that case.

The United States Supreme Court has previously ruled that candidates for judicial office do not surrender their First Amendment right to "vigorously and tirelessly advocate [their] own election." *Buckley v. Valeo*, 424 U.S. 1, 52 (1976). Likewise, the Washington Supreme Court, in *Sanders I*, also favored free speech over judicial discipline in the context of Justice Sanders addressing a political rally in the state capital. *Sanders I*, 135 Wn.2d 175. (Note – pro tem State Supreme Court Justice C. Kenneth Grosse authored the opinions in both *Sanders I* and *Sanders II*). The essence of protected speech, of course, is not just whether it is "political" – for, as the Washington Supreme Court recognized in *Sanders I*, at pp. 186-89, that is impossible to determine – but the *context* of the speech that is alleged to be protected. "[T]he character of every act depends upon the circumstances in which it is done." *Aikens v. Wisconsin*, 195 U.S. 194, 205-06 (1904).

Thus, the question before the Washington State Supreme Court was whether Justice Sanders was engaged in conduct that *should* be constitutionally protected under the First Amendment when he met, conversed with and accepted documents from institutionalized litigants, at their invitation, who had cases pending before the very court on which Justice Sanders sits. There are three principal reasons why Justice Sanders' conduct was not constitutionally protected.

First, it is essential that judges be held to a high standard of impartiality, and that, in certain circumstances like these, decisions about personal conduct yield to the institutional integrity of the judicial system. *In re Turco,* 137 Wn.2d 227, 970 P.2d 731 (1999) (judge struck his wife in a public venue) the Washington Supreme Court held that Canons 1 and 2(A) of the Code govern even extra-judicial conduct because " . . . the public invests judges with particular esteem. We must meet a higher standard of behavior." The Court surveyed decisions from other jurisdictions, all agreeing, that a judge " . . . is a standard-bearer of fairness and impartiality in our society. . . ." *Id.* at 243. (Citations omitted.)

Second, precisely because a judge is a standard-bearer of fairness and impartiality, appearances take on particular importance especially in the context of a matter that is actually pending before that judge. Thus, when Justice Sanders visited, conversed with and accepted documents from incarcerated sex predators who were litigants before Justice Sanders' own court, he was involved in far more than spontaneous social intercourse with members of the general public. His contact was specially related to the pending litigation and the nature of the contact related to

pending legal issues. The Commission, acting conservatively, did not go so far as to find that Justice Sanders expressly engaged in *ex parte* communication on these facts. The Commission presumably accepted Justice Sanders' parsing of the "volitional control" issue as a jury question; or the Commission may have accepted Justice Sanders' representation that he did not, in fact, "consider" the conversations he initiated in working on the case. It would be difficult, however, to describe a scenario that might give a worse *appearance* of *ex parte* communication.

According to the logic Justice Sanders urges this Court to adopt, if his conduct was constitutionally protected speech, then so would be the most overtly *ex parte* communication or investigation in any pending case. It was no more appropriate for Justice Sanders, outside the courthouse, to meet with litigants and to discuss issues that bore on pending issues before his court, than it would have been appropriate for members of the Washington Supreme Court, after oral argument and prior to issuing a decision in this case, to accept an invitation to go to the Commission office and to meet with members of the Commission on Judicial Conduct, discuss their views of the meaning of "pending litigation" and accept without question or limitation documents from members of the Commission.

No one seeks to impose what Justice Sanders calls "judicial monasticism," just common sense and the necessary basic protocols of impartiality that robes of judgeship require. The problem is not necessarily whether Justice Sanders' actual contact and conversation with litigants, and the personal receipt of documents from them would affect his own decision (a proposition nearly impossible to

prove absent an admission); the problem is precisely the *appearance* of partiality.

Third, although Justice Sanders has couched his First Amendment arguments in terms of his right to engage the public on the issues, the "issues" and his "public" in this case were very special: incarcerated sexual predators with litigation pending before the Justice's court relating to their conviction and incarceration as sexual predators – the topics of his conversations with them. By comparison, in *Buckley,* 424 U.S. 1, the case related to a judge's right to present issues to the public that were pertinent to the judge's election campaign for public office. Similarly, in *Sanders I*, the issues before the Washington Supreme Court related to the judge's right to appear and briefly address a public political rally and to thank those present for support in his election, having walked there directly from his swearing-in ceremony.

In stark contrast, the incarcerated sexual predators at the McNeil Island Penitentiary were felons who had no right to vote in judicial or any other elections. Presumably, the right to engage with the public on matters of public concern relates to the public's ability to exercise its own political rights. But that cannot be camouflage for Justice Sanders' receiving documents from disenfranchised felons, seeking out and engaging in extended personal conversations with them, and introducing topics of conversation at issue in their cases then pending before his court.

The "One-Tier" Judicial Disciplinary System Does Not Violate Due Process Rights.

Justice Sanders argues that he was denied procedural due process because the Washington State Constitution

provides for a one-tier structure for the Washington State Commission on Judicial Conduct. In Article IV, §31 of the Washington State Constitution, the people of Washington conferred upon the Commission the dual obligations of investigating and adjudicating allegations of judicial misconduct. The Commission's investigators conduct preliminary, confidential investigations, and report directly to the Commission members. If the Commission finds the preliminary evidence sufficient and reliable enough to authorize a statement of charges and initiate public proceedings, the Commission thereafter bifurcates from the staff and disciplinary counsel who are conducting prosecutorial functions in the case. CJC Members' Policy 4.5(a). (Members' Policies can be viewed at the Commission's website, www.cjc.state.wa.us.) At that point, the Commission members are relieved of all materials relative to the case that were previously submitted to them. Although the rules do not prohibit it, the practice of the Commission members is to avoid meeting in person or by telephone with disciplinary counsel prior to the filing of a statement of charges, as happened in this case. (CJC Record of Proceedings, P-44, Exhibit 2.)

The "one-tier" system has been upheld against constitutional challenge in every forum in the country where it has been litigated, including Washington State. *See, e.g., In re Deming*, 108 Wn. 2d 82, 736 P.2d 639 (1987), *In re Zoarski*, 227 Conn. 784, 632 A.2d 1114 (1993), *In re Schenck*, 318 Ore. 402, 870 P.2d 185 (1994), *In re O'Dea*, 159 Vt. 590, 622 A.2d 507 (1993), *Adams v. Commission on Judicial Performance*, 10 Cal. 4th 866, 42 Cal. Rptr.2d 606, 897 P.2d 544 (1995), *In the Matter of Vaughn*, 265 Ga. 843, 462 S.E.2d 728 (1995), *Commission on Judicial Performance v. Russell*, 691 So. 2d 929 (Miss. 1997), *In re*

Bowers, 721 So. 2d 875 (La. 1998), *In the Matter of Flournoy*, 195 Ariz. 441, 990 P.2d 642 (1999), *In re Holien*, 612 N.W.2d 789 (Iowa 2000), *Mosley v. Nev. Comm'n on Judicial Discipline*, 117 Nev. 371, 22 P.3d 655 (2001).

In his petition, Justice Sanders has very loosely defined his out-of-court conversations with litigant felons as "meeting with the public and discussing issues of public concern." Pet. for Cert. 19. His tendency to paint in broad terms is similar to his broad brush attack on the so-called "one-tier" system of judicial discipline. Indeed, the system is not "one-tier" nor unconstitutional nor "stacked" to the judge's disadvantage.

Unlike the customary trial where the facts are determined and only the law is reviewed on appeal, the entire process of the Washington Commission on Judicial Conduct is subject to *de novo* review by the highest court in the state, the nine justices of the Washington Supreme Court. Any judge disciplined by the Commission on Judicial Conduct, no matter how light the discipline (as in the instant case), has the right to demand that the law and the facts be reviewed *de novo*. Washington State Constitution Article IV, §31, Clause 6; Commission on Judicial Conduct Rule of Procedure 25. When misconduct is substantiated the Commission on Judicial Conduct is in effect an *advisory body* because it is the Washington Supreme Court itself, not bound to any of the Commission's findings or conclusions, that is the final arbiter of judicial discipline. In that respect, notwithstanding the label "one-tier," the Washington State system of judicial discipline is, indeed, a two-tier system with the ultimate guarantor of the system's own impartiality being the State Supreme Court itself. The feature of *de novo* review by the highest

state court has satisfied due process concerns in every forum where it has been contested.[2]

The cases cited by petitioner at pages 27 and 28 of his petition are inapposite. The medical administrative discipline scheme disapproved in Pennsylvania lacked meaningful court review. *Lyness v. Comm., State Bd. of Medicine*, 529 Pa. 535, 547, 605 A.2d 1204, 1210 (1992). In the Nevada case cited by petitioner, the Nevada Supreme Court's disapproval of its state's attorney discipline process was premised largely on the discipline system's conflicts of interest: disciplinary fines were a crucial source of revenue for the State Bar, *In re Ross*, 99 Nev. 1, 12, 656 P.2d 832, 839 (1983) and the adjudicators under the Nevada system were the Bar Board of Governors, who were also responsible for the financial integrity of the bar. *Ross*, 656 P.2d at 840. Neither the lack of plenary review seen in Pennsylvania nor conflicts of interest in Nevada are present in the Washington State system.

Nor is the structure of the Commission on Judicial Conduct prejudicial to Justice Sanders. Washington's constitution, Article IV, §31, mandates that the commission consist of eleven persons including a mix of lay,

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[2] *See, e.g., In re Hanson*, 532 P.2d 303 (Alaska 1975), *Flournoy*, 195 Ariz. 441, *Adams*, 10 Cal.4th 866, *In re Zoarski*, 227 Conn. 784, *In re Kelly*, 238 So. 2d 565 (Florida 1970), *Vaughn*, 265 Ga. 843, *Holien*, 612 N.W.2d 789, *In re Rome*, 218 Kan. 198, 542 P.2d 676 (1975), *Bowers*, 721 So. 2d 875, *In re Diener*, 268 Md. 659, 304 A.2d 587 (1973), *In re Chrzanowski*, 465 Mich. 468, 636 N.W.2d 758 (2001), *Russell*, 691 So. 2d 929, *In re Elliston*, 789 S.W.2d 469 (Missouri 1990), *Mosley*, 117 Nev. 371, *Friedman v. State of New York*, 24 N.Y.2d 528, 249 N.E.2d 369 (1969), *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977), *Schenck*, 318 Ore. 402, *In re Pirraglia* (Rhode Island Supreme Court February 28, 2007), *In re Brown*, 512 S.W.2d 317 (Texas 1974), *O'Dea*, 159 Vt. 590, *Deming*, 108 Wn.2d 82.

lawyer and judge representatives appointed by the state governor, the state bar association and various judicial organizations. It is a highly balanced body that encompasses multiple interests to safeguard the independence and integrity of the judiciary.

Purely from the perspective of sound policy, a commission like that mandated in Washington State, as a "one-tier" system, has the ability and experience to quickly and objectively investigate accusations of judicial misconduct. This serves the public, which has a high interest in having such accusations quickly dismissed or quickly brought to resolution. It also serves the interests of the judges so accused for the identical reasons that baseless accusations can quickly be dismissed or brought to resolution. The Constitution requires the Commission to conduct its own independent investigation of facts alleged in a complaint and to make its own independent analysis of whether there is probable cause that the Code of Judicial Conduct has been violated. (WA. State Constitution Article IV, Section 31). The vast majority of complaints received by the Commission on Judicial Conduct, about 96%, are dismissed after preliminary investigation. The Commission that considers the body of complaints brought before it becomes most experienced in this specialized area of law and facts, and is particularly well-informed in considering the few cases that are found to have probable cause to proceed.

The Washington State system for judicial discipline is not truly "one-tier," it has ample safeguards inherent in its policy of *de novo* review by the Washington Supreme Court, it is a broadly representative body, and, in the interests of the public and the judges, it has the experience, flexibility and speed to quickly deal with both legitimate and baseless complaints. These considerations

probably underlie the fact that the majority of states, 34, have systems that might be described, as Washington's, as "one-tier." Nothing whatsoever suggests that the system deprived Justice Sanders of his procedural due process rights.

The Washington Commission's Rules Governing Discovery Afford Complete and Reasonable Discovery to Respondent Judges, and Justice Sanders had Full Benefit of those Rules and Opportunity to Challenge the Hearing Panel for Cause.

As found by the Washington State Supreme Court in this case, Justice Sanders had full access to discovery in this case and "there is no basis to find that Justice Sanders was denied due process." *Sanders II*, 159 Wn.2d at 526. Pursuant to the Commission's Rules of Procedure (*see* website: www.cjc.state.wa.us), Justice Sanders received all of the documents and materials that formed the basis of the Commission's finding of probable cause. He had a list of all the witnesses called by the Commission, his attorney deposed many of them, and questioned all of them. Disciplinary Counsel provided him copies of all the written materials sought to be offered. This is a case where few, if any, of the facts alleged were in dispute and where the State Supreme Court reviewed the law and facts *de novo*. This is a case where Justice Sanders defended his actions by arguing that the Commission misapplied the Code to virtually uncontroverted facts.

In footnote 6 to his petition at pages 6-7, Justice Sanders acknowledges Commission rules that require disclosure and discovery be provided to respondent judges. Although the footnote states correctly that depositions require either stipulation of disciplinary counsel or the

order of the presiding officer, the footnote concludes somewhat misleadingly by noting "Discovery disputes are decided by the Commission and are not appealable prior to the final order." Although CJCRP 22(b)(3) in fact so states, Justice Sanders nonetheless sought and obtained interlocutory appeal to the State Supreme Court on disputed discovery issues in this case, which were considered and denied. (CJC Record of Proceedings, S-47.) At the petition on page 29, Justice Sanders makes a similarly misleading statement regarding discovery: "There is no discovery without disciplinary counsel or its consent." Although the meaning of that sentence is unclear, if it is intended to convey that disciplinary counsel has full control over discovery demands, that is patently untrue under the Commission's rules. Indeed, in the context of this particular case some of Justice Sanders' disputed discovery demands *were* granted over the objection of disciplinary counsel. (CJC Record of Proceedings, D-45.)

Justice Sanders does not seriously argue that his access to relevant witnesses or materials was actually impeded, stating to this Court: "In resolving this case, this Court does not need to delve into the details of discovery requests." Pet. for Cert. 30. His arguments to this Court specifically focus, rather, on his attempts to receive the full investigatory file on the possibility that *something* in there (beyond materials that led to a finding of probable cause or that would tend to negate such a finding, which were provided to him under CJCRP 17(d)(4)(c) and CJCRP 22(a)(1)) *might* have biased the Commission members against him.

Justice Sanders moved in discovery to interrogate disciplinary counsel. Most extraordinarily, Justice Sanders demanded the right to depose members of the Commission

fact-finding panel to delve into their minds on a purely speculative basis. (CJC Record of Proceedings, D-4.) There is no more basis for this extraordinary demand than there is for a litigant to be permitted to depose a judge or justice, without good cause, to troll for possible bias. The Commission's internal rules require members to recuse themselves from participating at any point in cases where they might have a conflict of interest. Under CJCRP 3(e), members are required to disqualify themselves where their impartiality "might reasonably be questioned." Under CJCRP 3(e)(3), respondent judges may challenge any member of the Commission for cause. If the challenged Commission member does not agree to recuse him or herself when challenged, the Chair of the Commission will make the final determination regarding recusal. Under Members' Policy 5.1(a), members are required to recuse themselves when "they cannot participate in a fair and reasonable manner or where their ability to do so might reasonably be questioned." (Nonexclusive examples of situations requiring recusal are provided in the policy. *See* website: www.cjc.state.wa.us.)

In his petition, Justice Sanders has darkly hinted that there was improper *ex parte* communication between staff and disciplinary counsel on the one hand, and the fact-finding hearing panel on the other, after the filing of a public Statement of Charges prohibits such contact. *See* footnote 3, page 6 of the petition. There is no reference in the record and absolutely no basis in fact for such an insinuation. Despite the warnings of his colleagues on the Washington Supreme Court, despite the testimony of witnesses present at the Special Commitment Center, despite the ruling of the Commission and the unanimous decision of the State Supreme Court on *de novo* review of

the facts and law, Justice Sanders has chosen to characterize this case as the product of an unjust imposition on his personal rights rather than an appropriate effort to preserve the appearance of integrity and impartiality in Washington's judicial system. The admonishment received by Justice Sanders is defined in the CJCRP terminology section as "a written action of the commission of an advisory nature that cautions a respondent not to engage in certain proscribed behavior. An admonishment may include a requirement that the respondent follow a specified corrective course of action. Admonishment is the least severe disciplinary action the commission can issue."[3]

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[3] U.S. Supreme Court Rule 15(2) states in part that "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Accordingly, we note that at page 30 of his petition, Justice Sanders alleges in the first full paragraph that "Commission members were not only aware of possible settlement discussions, but directed them to occur." This is not true. Disciplinary Counsel and Respondent's counsel asked the Commission members, prior to a finding of probable cause in the case, to delay the process to allow time to explore a possible agreed resolution of the case. The members played no role in actual negotiation. It is untrue that they "directed them to occur." The Commission's disciplinary counsel did not "meet with its Executive Director to discuss such negotiations." It is unknown why Justice Sanders states that she did. The statement in that same paragraph that "The Commission asked for and received legal briefings from staff regarding the potential charges it was being asked to file against Justice Sanders" implies the Commission did something improper in considering legal analysis from its own staff as it considered whether to formally bring a matter against a judge. It would be inexcusably remiss if the Commission did *not* consider law in the area of potential charges before addressing concerns to a judge.

CONCLUSION

This is a case in which the Washington State Supreme Court affirmed a restrained and straightforward application of established Canons by the Washington State Commission on Judicial Conduct. The Commission imposed a modest form of discipline appropriate to the facts, and the Washington Supreme Court affirmed that it was appropriate. Justice Sanders' due process and other constitutional rights were neither chilled nor impinged as both the Commission and the Washington State Supreme Court strove to preserve a simple but essential concept of justice: the need for a judge to avoid the appearance of bias and improper *ex parte* communication with parties in a case currently pending before his court. One day there might be a case brought before this Court which presents a serious weighing of First Amendment rights and the appearance of judicial impartiality. This is not that case. The Commission on Judicial Conduct respectfully submits that certiorari should be denied.

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APPENDIX A – Letter of Resignation from the ABA Committee to Evaluate the Model Code; Resolution of Conference of Chief Justices Regarding Appearance of Impropriety; *New York Times* Editorial Regarding Same

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February 3, 2007

Mark I. Harrison, Chair
ABA Joint Commission to Evaluate the
Model Code of Judicial Conduct
c/o Osborn Maledon, P.A.
2929 North Central Avenue, Suite 2100
Phoenix Arizona 85012-2794

Dear Mark:

With regret, I hereby resign from the Advisory Commission to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct.

I have high regard for you and all my colleagues in this project. I appreciate the hard work that went into producing the document, which the ABA House of Delegates will likely adopt within the next week or so. There are many improvements in the proposed Model Code that I

support, and for the most part, I can accept even those changes with which I happen to disagree.[1]

However, I cannot on principle endorse this proposed Model Code because I believe the Commission has inflicted serious injury on an indispensable Canon: the obligation of a judge to "avoid impropriety and the appearance of impropriety." I also object to the opaque way this was done.

The Preamble to the current Code declares that the Canons and Rules are "binding" on judges. After three years of public hearings, debate, feedback and compromise, the Commission reaffirmed that the Canons are mandatory and that a judge can be disciplined for violating them. This appears in the Scope section of its Report to the House of Delegates as posted on the ABA website in October 2006.

Now, however, just days before the ABA is to take up the Model Code, the Commission has privately amended the Scope, declaring that the Canons merely provide "guidance" and that "only" the Rules are enforceable. So far as I know, this new language is not posted or readily available.

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[1] In a wide-ranging project such as this, not every change will have every participant's support. I, for example, would have preferred greater limitations on judges whose travel and seminar attendance is underwritten by special interest groups. Others would have further relaxed the political-activity constraints on judges. For the most part, however, Commissioners and Advisors worked out their honest differences and made valuable improvements, such as making it easier for judges to help their substance-impaired colleagues, and extending the anti-discrimination provisions to include gays and lesbians.

Since the obligation to "avoid impropriety and the appearance of impropriety" is articulated in a Canon but not a Rule, the Commission's new formulation effectively nullifies it as an enforceable standard of judicial ethics. This is a monumental mistake.

Judges are public officials, performing a unique and vital role in our constitutional democracy. Their independence and integrity must be beyond reproach for the public to have faith in the administration of justice. At a time when the ABA is defending judicial independence from relentless attack, I cannot imagine that either the judiciary or the public will applaud the ABA for relegating the "impropriety and appearance of impropriety" standard to a virtually meaningless phrase that could not even be enforced in conjunction with some other ethics provision. Indeed, when the Commission first floated such an idea in May 2004, it wisely backed down after widespread editorial and civic rebuke. This backstage last-minute revival of a bad idea is disconcerting and mystifying.

There is no evidence that the "impropriety and appearance of impropriety" standard has been misused by either judicial disciplinary bodies or the state high courts that enforce judicial ethics. The due process of law applies to judicial disciplinary proceedings as readily as it applies to civil litigation and criminal prosecutions. No judge is charged or disciplined for violating a Canon without pleadings that allege specific facts on which the ethical violation is based. The "impropriety and appearance of impropriety" Canon has a substantial history. The phrase itself has meaning and application beyond the merely advisory. It has been part of judicial disciplinary jurisprudence for decades and should not be abandoned so cavalierly.

As far back as 1924, in the Canons of Judicial Ethics, the ABA has unequivocally declared that judges should avoid impropriety and the appearance of impropriety. In the 1972 Code of Judicial Conduct, the ABA elevated this concept into a Canon of its own. In the 1990 Model Code of Judicial Conduct, the ABA enhanced it further, explicitly making the Canons mandatory and declaring that judges "shall" avoid impropriety and the appearance of impropriety. In short, every time the ABA addressed this standard, it was strengthened. Until now.

I understand the Commission acted in order to accommodate certain committees of the ABA which indicated they would not support the Model Code otherwise. However, this Code is not intended for the Commission, or individual ABA committees, or the ABA itself. This code of conduct is intended to guide and govern the judiciary and to enhance public confidence in the judiciary.

It was my hope the Commission would lead, not sacrifice a fundamental principle of judicial ethics in private to gain the co-sponsorship of certain committees, long after others made their arguments in public. Ironically, this last-minute change by the Commission would put the ABA in conflict with the vast majority of states that have been enforcing the "impropriety and appearance of impropriety" standard for decades. It would undermine the vast majority of judicial advisory committees that have been invoking this standard in order to guide judges and keep them out of ethical trouble. It would be inconsistent with the code of conduct for federal judges, which in this respect goes beyond the existing ABA Model Code and defines the "appearance of impropriety." It would also be inconsistent with the ABA's own history. Whatever advances

the rest of the proposed Model Code may make, it is this regrettable setback for which it will be known.

At this point, I would suggest a Model Code that simply states, "The Canons and Rules are mandatory and a judge may be disciplined for violating them."

Notwithstanding my resignation, I appreciate the opportunity to have served, and I look forward to other occasions for us to get together.

Sincerely,

/s/ Bob
Robert H. Tembeckjian

CONFERENCE OF CHIEF JUSTICES

Resolution 3

Opposing the Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct in Light of its Failure to Provide for Enforceability of the Canon on "Appearance of Impropriety"

WHEREAS, in July 2003 the American Bar Association created a Joint Commission to Evaluate The Model Code of Judicial Conduct which operated under the auspices of the ABA Standing Committees on Ethics and Professional Responsibility and on Judicial Independence; and

WHEREAS, the Joint Commission's process has been extensive and open, and the chair and members of the Joint Commission have met on numerous occasions with work groups and committees of the Conference of Chief Justices to report on the work of the Commission and to seek insight and feedback from members of the Conference; and

WHEREAS, the Joint Commission's Report evidenced a careful evaluation of the Model Code based upon the extensive collective experience of judges with the existing Code and addresses specific questions stemming from new issues in the judicial selection process, the development of new types of courts and the increasing frequency of self-represented litigants in courts; and

WHEREAS, the American Bar Association House of Delegates will consider the Report at the upcoming 2007 ABA Midyear Meeting; and

WHEREAS, once the House of Delegates has approved a revised version of the Model Code, the merits of the

final recommendations of the ABA will be ripe for consideration by the highest court of each jurisdiction;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices opposes any revised version of the Model Code of Judicial Conduct that does not include a provision requiring avoidance of impropriety and the appearance of impropriety both as an aspirational goal for judges and as a basis for disciplinary enforcement; and

FURTHER, BE IT RESOLVED that without speaking to the merits of any of the other revisions proposed by the Joint Commission, the Conference of Chief Justices respectfully encourages the House of Delegates to amend the proposed revised Code as described above, and if so amended, to act expeditiously in its consideration of the Joint Commission's Report and Recommendations, at which time the Conference can commend to its members the revisions as a foundation upon which states can build to improve and clarify the standards of conduct for the judiciary.

Adopted as proposed by the Professionalism and Competence of the Bar Committee of the Conference of Chief Justices on February 7, 2007.

The New York Times

February 9, 2007
EDITORIAL

The A.B.A.'s Judicial Ethics Mess

At a moment when judicial independence is under heightened political attack, the nation's legal establishment should be doing everything it can to shore up public trust. Instead, the special commission charged with recommending revisions to the Model Code of Judicial Conduct of the American Bar Association has been flip-flopping around on some of the most important aspects of the code, which the states use to set standards for their courts.

For decades, the code's overarching charge to judges has been to avoid not only actual impropriety, but also the appearance of impropriety. Recently, however, quietly adopted changes to the commission's "final" report demoted this gold standard of judicial conduct from an enforceable rule to a mere aspirational guideline.

When the misguided switch came to light, the panel reversed field again yesterday and went back to the previous formulation. But that does not excuse the fact that the panel was following internal politics, not sound legal principle. The change might have eluded public attention if Robert Tembeckjian, the administrator of the New York State Commission on Judicial Conduct, had not protested and Adam Liptak had not reported on the matter in The Times this week.

Mark Harrison, chairman of the flailing ethics panel, claimed just days ago that the "appearance of impropriety" standard was vague and unfair. But judges interpret rules like that all the time, and the Conference of Chief Justices,

made up of top state judges, unanimously endorsed the appearance of impropriety as a basis for disciplinary enforcement.

Despite yesterday's news, the proposed code revisions have serious deficiencies. They fall well short of ending the festering scandal of expense-paid judicial seminars that are held at desirable resorts and underwritten by private interests. If the House of Delegates lacks the resolve to ban these junkets, it should at least limit reimbursements for accompanying spouses. There should be no free rides or free lunches (or breakfasts or dinners).

The rules on when a judge must bow out of hearing cases also need work. At the federal level, judges must recuse themselves when they have any financial interest raising a potential conflict. That is far preferable to the model code's approach of letting state judges decide for themselves whether their financial conflict is minimal enough to stay on a case.

There is a real danger in relying on this commission's judgment. Members of the A.B.A.'s House of Delegates are supposed to vote on the new code next week in Miami. Their wisest course would be to defer the issue, at least until the group's next meeting in August. In the meantime, the president of the bar should appoint an independent committee of experts to review all of the provisions and make their own assessment of what is really needed.

APPENDIX B

AVOIDING THE APPEARANCE OF IMPROPRIETY: WITH GREAT POWER COMES GREAT RESPONSIBILITY

[Article from 28 U. Ark. Little Rock L. Rev. 64 (2005)]

*Cynthia Gray**

I. INTRODUCTION

If a judge tells a police officer who stopped him for a traffic offense that his arrest is unnecessary because "we need each other," the judge clearly violates the proscription on using the prestige of judicial office to advance the

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* Since October 1990, Cindy has been director of the American Judicature Society's Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline. She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes and edits the *Judicial Conduct Reporter,* and directs the Center's day-to-day activities and special projects. She has made numerous presentations at judicial education programs on judicial ethics topics. Most recently, she is author of *Reaching Out of Overreaching: Judicial Ethics and Self-Represented Litigants, "The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability," Hofstra Law Review* (Summer 2004), and *Ethics and Judges' Evolving Roles Off the Bench: Service on Governmental Commissions, A Study of Judicial Discipline Sanctions.* She has also written *An Ethics Guide for Judges and Their Families* and the related discussion guide; *When Judges Speak Up: Ethics, the Public, and the Media; An Ethics Guide for Part-Time Lawyer Judges; Communicating with Voters: Ethics and Judicial Campaign Speech; Ethics Training for Non-Lawyer Judges; the Handbook for Judicial Conduct Commission Members*; and eight background papers on key issues in judicial ethics. She is also co-author of the *Judicial Conduct and Ethics Curriculum.* A 1980 graduate of the Northwestern University School of Law, Cindy clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

judge's private interests.[1] But is it a violation if the judge simply shows the officer a judicial identification card instead of a driver's license without expressly asking for or demanding favorable treatment?[2] A judge's call advising an assistant prosecutor to be more emotional in front of the jury in a sexual assault trial is an obvious, prohibited ex parte communication.[3] But if the judge simply meets privately with some attorneys in chambers just before they are to appear in his court and no one overhears the conversation, is it reasonable to assume no ex parte communications took place and there was no violation?[4] A judge

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[1] When the officer was not deterred, the judge warned the officer to "watch out from here on in." In re Winkworth, Determination (N.Y. Comm'n on Jud. Conduct Sept. 23, 1992), *at* http://www.scjc.state.ny.us/Determinations/w/winkworth.htm (admonition for this misconduct and driving while impaired).

[2] In re Werner, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 1, 2002) *at* http://www.scjc.state.ny.us/determinations/w/werner.htm (admonition pursuant to agreement for handing over license and court identification card when stopped by officer for speeding); In re Heiple, Order (Ill. Courts Comm'n Apr. 30, 1997) (censure for four traffic stops in which the justice failed to cooperate with and disobeyed law enforcement officials and volunteered the information that he was a member of the judiciary).

[3] In re Starcher, 457 S.E.2d 147, 148-49 (W. Va. 1995) (reprimand). The judge also advised the prosecutor to have supporters present in the courtroom during closing argument and to use the term "serial rapist" frequently. The telephone call had been overheard by a law firm associate who was sitting in a room adjoining Judge Searcher's chambers when she became aware of a telephone conversation between the judge and the assistant prosecuting attorney about a criminal trial in which the defendant was accused of sexually assaulting several female students at West Virginia University. The judge admitted that the conversation occurred. *Id.*

[4] *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591 (Cal. 1990). For further discussion of this case, *see infra* accompanying text at notes 146-47.

who solicits bribes before improperly disposing of matters unquestionably commits a violation of the code of judicial conduct as well as a crime.[5] But is there an ethical breach if a judge initiates business transactions with a litigant and gets favorable terms after rendering a large monetary judgment?[6]

To hold judges to the highest standards of ethical conduct, a code of judicial conduct must cover not just the clear and obvious improprieties but indirect, disguised, or careless conduct that looks like an impropriety to an observer who is informed and thoughtful but not prescient or gullible. Thus, much of the American Bar Association Model Code of Judicial Conduct[7] is based on reasonable assumptions about a judge's impartiality based on the judge's conduct. For example, a judge may be capable of rendering unbiased decisions even if he belongs to a discriminatory organization, but rather than asking the public to take that on faith, judges are prohibited from belonging

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[5] *See, e.g., In re Jenkins*, 465 N.W.2d 317 (Mich. 1991).

[6] *See Adams v. Comm'n on Jud. Performance*, 897 P.2d 544 (Cal. 1995) (removal for this and other misconduct). For a further discussion of this case, *see infra* text accompanying notes 80-90.

[7] References to the code of judicial conduct and to canons or sections of the code are to the *1990 American Bar Association Model Code of Judicial Conduct*. The 1990 model code retained most of the basic principles of the 1972 ABA model code but made several substantive changes and contains many differences in its details. Although the model code is not binding on judges unless it has been adopted in their jurisdiction, forty-nine states, the United States Judicial Conference, and the District of Columbia have adopted codes of judicial conduct based on either the 1972 or 1990 model codes. (Montana has rules of conduct for judges, but they are not based on either model code.)

to organizations that practice invidious discrimination.[8] Similarly, a judge may be able to render a fair decision even if her nephew is the attorney in the case, but rather than give the parties a basis for questioning the decision, the judge is required to disqualify.[9]

In addition, the code of judicial conduct provides in Canon 2 that "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities," defining an "appearance of impropriety" in commentary as conduct that "would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[10] The reasonable person standard is also present in code sections requiring a judge to disqualify himself or herself from a case when the judge's "impartiality might reasonably be questioned,"[11] and requiring a judge to conduct all extra-judicial activities so that they do not "cast reasonable doubt on the judge's capacity to act impartially as a judge."[12]

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[8] Canon 2C ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin").

[9] Canon 3E(1)(d). The parties may waive that disqualification. Canon 3F.

[10] All states but Oregon and Montana refer to the appearance of impropriety in their codes of conduct.

[11] Canon 3E(1). This article will focus on cases other than those involving disqualification. For a discussion of the application of the appearance of impartiality standard for disqualification, *see* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably be Questioned,"* 14 GEO. J. LEGAL ETHICS 55 (Fall 2000).

[12] Canon 4A(1).

Some critics have argued that the appearance of impropriety standard is at best merely aspirational and at worse unconstitutionally vague and in either case out of place in a code used as the basis for disciplinary sanctions of judges. Several groups, although none comprised solely or even largely of judges, have asked the ABA to eliminate the standard from the model code in its current revision process.[13]

Canon 2, however, is a vital component of the code of judicial conduct. As the case-law analysis in this article will demonstrate, judicial discipline authorities are not using the standard as an arbitrary smell test but are applying it in a cautious, reasoned, and appropriate manner with no evidence of overly subjective interpretation. This article will also examine the criticisms of the

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[13] *See* Letter from Ronald C. Minkoff, Secretary, Association of Professional Responsibility Lawyers, to ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (June 30, 2004), *at* http://www.abanet.org/judicialethics/resources/comm_rules_minkoff_063004.pdf [hereinafter APRL comments]; Memorandum from Charles E. McCallum, Chair, ABA Standing Committee on Ethics and Professional Responsibility, to Mark I. Harrison, Chair, ABA Commission on Evaluation of the Model Code of Judicial Conduct (Apr. 12, 2005), at http://www.abanet.org/judicialethics/resources/comm_rules_aba_ethics%20committee_4125_ddt.pdf. In September 2003, the ABA appointed a Joint Commission to Evaluate the Model Code of Judicial Conduct to review the ABA's Model Code and to recommend revisions. The Commission has held public hearings across the country in 2004-2005 and released several drafts. A preliminary report was released for comment in June 2005, and a final report will be considered by the ABA House of Delegates in 2006. See http://www.abanet.org/judicialethics/home.html. Although in partial drafts, the ABA Joint Commission watered down the "appearance of impropriety" standard, in the preliminary draft, it left the standard essentially unchanged from the 1990 model code, noting that the "[m]ajority of commentators on the subject, citing to judicial discipline decided over a three-decade period, urged that the concept be retained."

standard. The article concludes that the standard is not too vague to follow and that, given their power and prestige, requiring judges to consider the implications of their conduct for public confidence in the judiciary is not too much to ask and, indeed, is a responsibility most judges readily assume.

II. Appearance of Impropriety as an Aspirational Standard

The code of judicial conduct is not simply a penal provision, threatening judges with the possibility of disciplinary sanction, but an important reminder to them of the ethical foundations of their role in a free society. The appearance of impropriety standard is "peculiar to the judiciary"[14] because judges have a peculiar position in the American system; they are required to make decisions that sometimes many members of the public will challenge and at all times at least one party will dispute. Although judges must ignore public clamor about the substance of their decisions, they cannot afford a callousness toward public opinion about their integrity and impartiality based on the choices they make about their conduct.

Moreover, incorporating those values in the code of judicial conduct – which is adopted by the state supreme courts – announces to citizens that judges are willing to hold themselves to very demanding ethical standards in light of the power they are given over others' lives.

> Avoiding the appearance of impropriety is as important to developing public confidence in the

[14] In re Spector, 392 N.E.2d 552, 553 (N.Y. 1979).

> judiciary as avoiding impropriety itself. The responsibility of the judge extends not only to the business of the courts in its technical sense, such as the disposition of cases, but also to the business of the judge in an institutional sense, such as the avoidance of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system from the actions of a judge.[15]

The appearance of impropriety standard does not unfairly assume that judges lack integrity, but the alternative of asking the public simply to trust that judges are upright despite appearances[16] ignores the public's suspicions about public officials in general as well as judges,

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[15] In re Dean, 717 A.2d 176, 185 (Conn. 1998).

[16] Judge Alex Kozinski, of the United States Court of Appeals for the Ninth Circuit, for example, has argued:

> I know there's a growing tendency to distrust judges – to craft more elaborate ethical rules and restrictions, to expand the scope of what is encompassed within the appearance of impropriety standard, to adopt better methods of intruding into judges' private lives – all in a misguided effort to promote ethical judicial behavior. But the hard truth is that few of those things really matter. Judicial ethics, where it counts, is often hidden from view, and no rule can possibly ensure ethical judicial conduct. Ultimately, there is no choice but to trust the judges. To my mind, we'd all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every aspect of judicial life – obligations that each judge has the unflagging responsibility to police for himself.

Alex Kozinski, *The Appearance of Impropriety,* LEGAL AFFAIRS (Jan. – Feb. 2005), *available at* http:www.legalaffairs.org/issues/JanuaryFebruary2005/argument_Kozinski_janfeb05.msp. *But see* M. Margaret McKeown, *Canon Fodder,* LEGAL AFFAIRS (May – June 2005), *available at* http://www.legalaffairs.org/issues/May-June2005/letters_mayjun05.msp.

suspicions that unfortunately have been confirmed and aggravated by scandal after scandal, some of which have involved judges. A reasonable level of cynicism by members of the public is justified; it would be naïve and foolish for citizens to blindly trust any public official, and it would imprudent for judges to assume, assert, or act as if they should be exempt from that skepticism.

All public servants are as a practical matter held to an appearance of impropriety standard by the press and public if not by a code of conduct. Reflecting that unofficial gauge, Canon 2 reminds judges to think carefully about what they say and do and to consider the perspective of a reasonable person who does not know them well. That is not bad advice for everyone, and it is a critical factor in maintaining public confidence in an individual judge and the judiciary in general.

III. Appearance of Impropriety as a Disciplinary Standard

The appearance of impropriety standard is necessary and justified even if the code is viewed only from a disciplinary perspective. Although in most judicial discipline cases, a judge is charged with violating a specific canon such as the prohibition on ex parte communications, there are cases based on findings of an appearance of a violation. Most appearance cases fall into several categories.

A. Use of Influence: Winks and Nods

Invoking the judicial office to cajole or bully a favor is a classic example of judicial misconduct, giving rise to

numerous judicial discipline cases.[17] If the pressure is express and the favor is granted, the improper use of the

[17] *See, e.g.*, Inquiry Concerning Platt, Decision and Order (Cal. Comm'n on Jud. Performance Aug. 5, 2002) *available at* http://cps.ca.gov/cn%20removals/Platt%208-5-02.rtf (asking another judge to release on her own recognizance the daughter of a family from the judge's church); Inquiry Concerning Holloway, 832 So. 2d 716 (Fla. 2002) (requesting scheduling favor from another judge for family member); In re Parros, 847 So. 2d 1178 (La. 2003) (intervening on behalf of niece with prosecuting attorney, presiding judge in her felony theft case, and victim's father); Comm'n on Jud. Performance v. Brown, 761 So. 182 (Miss. 2000) (contacting officer who arrested son for DUI and asking judge assigned to son's case for help getting the case dismissed); In re Bowers, Determination (N.Y. Comm'n on Jud. Conduct Nov. 12, 2004) *available at* http://scjc.state.ny.us (stating in letter to another judge on judicial stationery about a ticket received by an acquaintance "if you can help out I would appreciate this, and if not, I will understand"); In re Canary, Determination (N. Y. State Comm'n on Jud. Conduct Dec. 26, 2002) *available at* http://scjc.state.ny.us/determinations (angrily disputing traffic tickets issued to the judge's son with police officer and his superior; intervening in son's second arrest); In re Leonard, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 26, 2002) *available at* http://scjc.state.ny.us (acting as advocate with police officer for grandson and asking why she had not been given advance notice of a search); In re Magill, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 6, 2004) *available at* http://scjc.state.ny.us (interjecting judicial prestige into case in which wife was complaining witness); In re Martin, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 26, 2001) *available at* http://scjc.state.ny.us (letters seeking special consideration on behalf of defendants awaiting sentencing in other courts on judicial stationery); In re Williams, Determination (N.Y. State Comm'n on Jud. Conduct May 17, 2002) (asking another judge to vacate an order of protection entered against friend) *at* http://www.scjc.state.ny.us; In re Berkhimer, 828 P.2d 19 (Pa. Ct. Jud. Dis. 2003) (calling police officer about driving while intoxicated charge against someone else, leading officer to withdraw charges); In re Kelly, 757 A.2d 456 (Pa. Ct. Jud. Dis. June 29, 2000 and August 23, 2000) (contacting another judge about a friend's traffic violation, stating "I would appreciate your help not guilty he is a great guy he can help you, come through me I don't ask to much").

prestige of office and the violation of the code of judicial conduct are obvious.[18]

More subtle, less bald-faced but still manifest attempts to gain an improper advantage from the judicial office are captured by the appearance of impropriety standard and represent the largest number of cases finding an appearance of impropriety. This application of the appearance standard reflects the reasonable person's understanding that much of human communication is unspoken, between-the-lines, with winks and nods, and depends on what goes without saying. Gratuitous references to the judicial office, for example, have been held to impliedly but obviously and inappropriately invoke the prestige of the office even absent an express request for favorable treatment.

For example, in *In re Collester,*[19] the New Jersey Supreme Court considered a judge who, stopped on suspicion of driving while intoxicated, told the trooper that he was a superior court judge when asked for his driving credentials and repeated the statement during the field sobriety tests. The court found that the judge's " 'references to his judicial status gave the impression that he was entitled to some special preference.' He thus clearly used the prestige and weight of his judicial office to try to gain some personal advantage."[20]

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[18] Canon 2B provides in part that "a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."

[19] 599 A.2d 1275 (N.J. 1992).

[20] *Id.* at 1278. The judge was suspended for two months without pay for his second DWI violation as well as informing the arresting officer that he was a judge and falsely stating that he was responding to

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In a different context but with a similar conclusion, the New York State Commission on Judicial Conduct found that, regardless of intent, a judge's repeated, pointed references to his judicial status during a dispute with a snowmobile dealer created the appearance that he was attempting to use his judicial prestige to further his personal interests.[21] The judge had identified himself as a judge while talking to a salesman, a secretary, the manager, and the proprietor even though his judicial status was irrelevant to whether he was entitled to be reimbursed for repairs to his snowmobile. When refused reimbursement, the judge stated he would take the matter to small claims court and that he knew how "the system"

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an emergency at the courthouse. *See also* In re Travis, Order (Ill. Ct. Comm'n Feb. 21, 2003) (one-month suspension for, in addition to other misconduct, showing badge that said "judge" to police officer and telling officer he was a judge); In re Werner, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 1, 2002) *available at* http://scjc.state.ny.us (admonishment pursuant to agreement for showing official identification card when stopped by police for traffic offenses even absent explicit request for special consideration); In re Cipolla, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 1, 2002) *available at* http://scjc.state.ny.us (censure for, in addition to other misconduct, displaying an identification card and badge that identified him as an acting judge during a dispute with a club doorman when the doorman had not asked for identification); In re Esposito, Determination (N.Y. State Comm'n Sept. 19, 2003) *available at* http://scjc.state.ny.us (censure pursuant to agreement for, in addition to other misconduct, referring to his judicial office while complaining to tax assessor about the assessment of property owned by the wife of a former colleague with whom he had a contentious relationship); In re Krauciunas, Determination (N.Y. State Comm'n on Jud. Conduct Nov. 18, 2002) *available at* http://scjc.state.ny.us (admonition for being rude and gratuitously referring to judicial office while dealing with other judge and clerk about daughter's small claims case).

[21] In re Dumar, Determination *available at* http://scjc.state.ny.us (N.Y. State Comm'n on Jud. Conduct May 18, 2004).

worked. When he did file suit, he left his business card with the clerk of the court and introduced himself to a judge of the court where the case was pending. Finally, he identified himself as a judge when he made a complaint about the dealership to a state agency. The Commission found that the judge's statements "could well be perceived as intimidating, especially in the context of demanding reimbursement for the repairs, threatening a lawsuit and saying that he knew how 'the system' worked."[22]

Moreover, in the context of legal proceedings, an attempt to influence is inherent in even a simple inquiry from a judge to an individual such as a police officer, prosecutor, or other judge who is aware of the inquirer's judicial status. Any communication from a judge in that situation may be perceived as "backed by the power and prestige of judicial office"[23] and constitute an implied request for a favor.

In *In re Snow*,[24] after his brother was cited for speeding, Judge Snow called the police officer who had issued the summons and remarked that it was funny that the officer had not recognized his brother because the officer had helped his brother paint the judge's house the previous summer.[25] The officer told the judge that if he had known the driver was the judge's brother, he would probably have only issued a warning.[26] Although Judge Snow

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[22] *Id.* The Commission censured the judge pursuant to an agreement. *Id.*

[23] In re Lonschein, 408 N.E.2d 901, 902 (N.Y. 1980).

[24] 674 A.2d 573 (N.H. 1996).

[25] *Id.* at 574-75.

[26] *Id.*

told the officer that he was not calling to fix the ticket, the ticket was thrown away when the judge's brother, at the judge's direction, brought the summons to the police station.[27]

Rejecting the judge's argument that he did not engage in serious misconduct because he did not intend to fix his brother's ticket, the New Hampshire Supreme Court concluded that "[t]here is no intent requirement in these canons," and "in fact, it is practically impossible to impose a mens rea element on the 'appearance of impropriety' standard in Canon 2."[28] The court stated that "[e]ven assuming that Judge Snow was not subjectively aware of the impropriety of his telephone call at the time that he made it, Judge Snow should have known that his actions would create the appearance of impropriety."[29]

As *Snow* demonstrates, the appearance of influence is created even if the judge tells the contact that he or she is not seeking favorable treatment. In a similar case, Judge Pennington met with the county district attorney to review a charge against his sons; the charge was dismissed for lack of prosecution, which suggested that the judge's advocacy was successful.[30] The judge had told the district attorney that he was there as the defendant's father and not to use his position to ask for any favors, but in discipline proceedings, the judge "acknowledged that the mere

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[27] *Id.*

[28] *Id.* at 577 (citation omitted).

[29] *Id.* at 578. The court suspended the judge for six months without pay.

[30] In re Pennington, Determination *available at* http://scjc.state.ny.us (N.Y. State Comm'n on Jud. Conduct Nov. 3, 2003).

fact of his judicial status increased the likelihood that he could not only obtain such a meeting, but get the District Attorney's 'heightened attention' to his concerns about his son's treatment."[31] The New York Commission concluded the contact was prohibited by "well-established ethical standards" even in the absence of a specific request for special consideration.[32]

Proof that the judge's conduct actually resulted in inappropriate influence is not necessary to prove an appearance of influence. In *In re Chaisson*,[33] Judge Chaisson had promised a litigant that "he would check on the status of a settlement" being negotiated for a $15 million judgment against the state for injuries that had left the litigant a quadriplegic.[34] While in the state capitol regarding a judicial salary bill, the judge asked the state officials handling the settlement negotiations about the figures on the table.[35] The Louisiana Supreme Court noted that there was no evidence that Judge Chaisson actually influenced the settlement. Therefore, the judge had not used the prestige of his office to advance the litigant's interests.[36]

The court, however, did not end the inquiry there but proceeded to consider whether the judge's inquiry would raise a reasonable person's suspicions that he had lent the

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[31] *Id.*

[32] *Id.* The judge was censured pursuant to an agreement for this and other misconduct.

[33] 549 So. 2d 259 (La. 1989).

[34] *Id.* at 261.

[35] *Id.* at 262.

[36] *Id.* at 263. Any settlement would have required a legislative act to appropriate funds for payment.

prestige of his office to advance the litigant's interests.[37] The court noted "it was highly unlikely that an ordinary citizen claiming to be a friend of [the litigant] would have been made privy to the details of the settlement negotiations."[38]

> [S]ince the matter settled on terms favorable to [the litigant] shortly after Judge Chaisson's involvement, a reasonable person might well suspect that this was the result of some improper influence. This suspicion is made even more reasonable by the fact that the true nature of Judge Chaisson's involvement was not public and thus even more likely to be perceived as wrongdoing. These factors alone are sufficient to establish the appearance of impropriety that weakens "public confidence in the integrity of the judiciary. . . ."[39]

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[37] *Id.*

[38] *Id.*

[39] *Chaisson*, 549 So. 2d at 263. *See also* Inquiry Concerning Simpson, Decision and Order (Cal. Comm'n on Jud. Performance Dec. 9, 2002) *available at* http://cjp.ca.gov/CNCenureRTF/Simpson%20Decision%2012-9-02.rtf (censure of retired judge pursuant to agreement for asking a court commissioner question about tickets issued to three friends or relatives of friends; calling a commissioner about a ticket received by a friend; asking a police officer); Inquiry Concerning Block, Decision and Order (Cal. Comm'n on Jud. Performance Dec. 9, 2002) *available at* http://cjp.ca.gov/CNCensureRTF/Block%20Decision%2012-09-02.rtf (censure of retired judge pursuant to consent for expressing concern to managing judge about way ticket for friend's daughter had been handled); Inquiry Concerning Platt, Decision and Order (Cal. Comm'n on Jud. Performance Aug. 5, 2002) *available at* http://cjp.ca.gov/CN%20Removals/Platt%208-5-02.rtf (removal for, in addition to other misconduct, calling a court commissioner to learn how his godfather might go about getting his ticket on the calendar); In the Inquiry Relating to Alvord, 847 P.2d 1310 (Kan. 1993) (censure for, in addition to other misconduct, making two unsolicited phone calls on behalf of a clerk to a prosecutor asking if anything could be done about

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The use of judicial letterhead also inherently and inevitably creates the appearance of a misuse of the prestige of office. When a justice of the Alaska Supreme Court sent three letters on chambers stationery to the counsel for a state agency regarding litigation in which the justice was involved as a private citizen, the court found that a reasonably objective person would believe that the justice was attempting "to influence opposing counsel and other viewers of the letters or that it had this effect."[40]

The court noted that the judge easily could have avoided risking a negative effect on the confidence of the public by using different stationery.[41] The court also

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a ticket although there was no actual use of influence attempted by the judge and none was perceived by the prosecutor); In re Young, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 29, 2000) *available at* http://www.scjc.state.ny.us (censure pursuant to agreement for telling a hearing examiner that a friend's ex-husband was a "hard ass" and was being "unreasonable" by not contributing to the college expenses of one of their children); In re Whelan, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 27, 2001) *available at* http://www.scjc.state.ny.us (admonition pursuant to agreement for urging attorney to convince clients to pay bill related to real estate transaction handled by judge's spouse); In re Looper, 548 S.E.2d 219 (S.C. 2001) (reprimand of former judge pursuant to consent for communicating with another judge to ensure that judge was aware of his personal interest in pending case). *But see* Inquiry Concerning Holloway, 832 So. 2d 716 (Fla. 2002) (request to a police detective conducting a criminal investigation of allegations involving a family friend keeping her apprised of developments in the case was "not, in itself, sufficient to conclude that the judge is abusing her office").

[40] Inquiry Concerning a Judge, 822 P.2d 1333, 1340 (Alaska 1991).

[41] *Id.* at 1341. Rejecting the justice's argument that it was not official stationery and the court system had no written policy restricting the use of chambers stationery, the court found that "an objectively reasonable person would not know the difference between the two types of stationery or whether any policy existed" and individual judges have

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concluded that whether the recipients of the letters were influenced by the stationery was irrelevant to the opinions of the thinking public who might see the letters.[42]

The judge in *In re Mosley*[43] sent two letters on court letterhead to his son's school asking that the school prohibit his ex-girlfriend (his son's mother) from visiting the boy at school. The judge argued that he had not misused the prestige of office because the school principals already knew he was a judge and did not provide special treatment to him.[44] Rejecting that argument, the Nevada Supreme Court concluded that an objective reasonable person could conclude that the judge used his judicial letterhead in an attempt to gain a personal advantage.[45]

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an obligation to follow ethical constraints notwithstanding any court system policy or lack of policy. *Id.* at 1340-41.

[42] *Id.* However, rejecting the Commission's finding, the court concluded that a reasonably objective person would not believe that an impropriety was afoot from the justice's identification of himself as a "justice" when calling the governor because in the same conversation he stated he was calling on a personal matter. *Id.* at 1341. The justice was privately reprimanded for meeting with the governor and using judicial stationery to communicate with opposing counsel in a private lawsuit. *See id.*

[43] 102 P.3d 555 (Nev. 2004).

[44] *Id.* at 559.

[45] *Id.* The judge had been awarded custody of the boy after a bitter battle with his ex-girlfriend. The judge was censured and fined $5,000 for this and other misconduct. *See also* In re Nesbitt, Determination (N.Y. Comm'n on Jud. Conduct June 21, 2002) *available at* http://www.scjc.state.ny.us (admonition pursuant to agreement for letter on judicial stationery to school official challenging administrative determination concerning judge's son). *But see* In re Rosenblum, Order (Ill. Ct. Comm'n July 29, 1993) (dismissing a complaint alleging that a judge used the prestige of office to advance his personal interests in connection with an apartment building the judge co-owned by identifying himself as a judge in a telephone call to a social worker with the

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The Washington State Commission on Judicial Conduct found that a judge's inquiry to an attorney about a campaign sign endorsing his opponent in front of the attorney's office could reasonably be perceived as an attempt to exert, at least implicitly, influence over the attorney.[46] The judge inquired why a campaign sign endorsing the judge's opponent was displayed in the yard in front of the attorney's law office and whether the display meant the attorney was supporting the judge's opponent. The conversation was cordial, but it occurred in the judge's courtroom, while the judge was on the bench, wearing his judicial robe and immediately following a hearing in which the attorney participated.[47]

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charitable organization that had guaranteed the lease payments, sending letters to the organization using official court stationery, attending several court hearings in a criminal misdemeanor complaint against the tenant filed by the judge's co-owner, and assuming a substantial role in the hearings).

[46] In re Krouse, Stipulation, Agreement, and Order of Reprimand (Wash. State Comm'n on Jud. Conduct June 10, 2005) *at* http://www.cjc.state.wa.us/casematerial/2005/4560%20stipulation.pdf. *See also* In re Sobel, Imposition of Discipline (Nev. Comm'n on Jud. Discipline July 19, 2005) *at* http://www.judicial.state.nv.us/decisiononsobel.htm (a judge told an attorney he was "fucked" because he had not yet contributed to the judge's re-election campaign and asked a second attorney why he had contributed $3,500 to the judge's opponent's campaign but only $500 to the judge's campaign).

[47] The Washington Commission also concluded that the judge appeared to personally solicit campaign contributions in three e-mails when, during his 2004 judicial campaign, his campaign committee co-chair sent three e-mails from the campaign e-mail accounts (prefixed with "judgekrouse") that requested monetary donations to assist in the judge's campaign. The e-mails were written in the first person and two of the e-mails concluded with "Merle" (the judge's first name) in the typed signature line. The Commission noted the judge had the duty to assure communications from his campaign committee complied with the code of judicial conduct.

B. Appointments: No *Quid Pro Quo*

The code of judicial conduct prohibits favoritism in appointments, requiring a judge to "exercise the power of appointment impartially and on the basis of merit."[48] An appearance of favoritism "is no less to be condemned than is the impropriety itself."[49] While few cases find proof of actual favoritism, several hold that a combination of factors produced the appearance that a judge exercised the power of appointment based on something other than the appointee's qualifications.

For example, in a case from Alaska,[50] Judge Johnstone appointed an individual he knew was the friend of the chief justice because the chief justice had suggested him. Because of the candidate's connection to the chief justice, the Alaska Supreme Court noted, the judge should have known he had to take special precautions to avoid the appearance of favoritism.[51] Instead, Judge Johnstone went outside the merit selection process he had initiated to appoint the chief justice's friend.[52] The individual had not applied during the application period, and the appointment was based on criteria that were not part of the stated

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[48] Canon 3C(4).

[49] In re Spector, 392 N.E.2d 552, 554 (N.Y. 1979).

[50] In re Johnstone, 2 P.3d 1226 (Alaska 2000). Because the case involved the chief justice, review was by a special supreme court comprised of members of the court of appeals.

[51] *Id.* at 1236.

[52] *Id.* Noting that it was undisputed that the judge initially had no duty to follow a merit selection process, the court stated that once he initiated a merit process, it should have been obvious to the judge "that he could not select an individual from outside the process without upsetting the reasonable expectations" of the individuals who had followed established procedures. *Id.*

qualifications and "on terms . . . that were significantly different from those advertised to the general public."[53]

The court emphasized that the question was not whether the judge's individual actions viewed in isolation would give rise to an appearance of impropriety" but "the cumulative effect" of the actions.[54] The court concluded that the events "would leave an objectively reasonable person with the indelible impression" that the coroner's hiring involved favoritism.[55] The court noted that the judge's explanation that he thought the man he hired was the most qualified applicant did not eliminate the appearance arising from the objective record.[56]

Similarly, the Louisiana Supreme Court found an appearance of impropriety when a judge hired his girlfriend to review and summarize medical records in nineteen cases, paying her with taxpayer funds and using taxpayer money to pay for her training to become a certified legal nurse consultant.[57] No actual favoritism was found as the judge's girlfriend was fully qualified to do the work for which she was hired and did indeed perform the work and her involvement did not affect the judge's adjudicatory function.[58]

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[53] *Id.*

[54] *Id.* at 1236-37.

[55] *Id.*

[56] *Johnstone*, 2 P.3d at 1237. The judge was publicly reprimanded.

[57] *In re Granier*, 906 So. 2d 417 (La. 2005).

[58] The judge was censured pursuant to the Judiciary Commission's recommendation, to which the judge had consented. The judge was also required to reimburse his court for the amount paid for his girlfriend's tuition to attend a week-long legal nurse consultant course and to cover her travel expenses. The Commission had found that the judge "unwit-

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The timing of a judge's appointments of her accountant as a fiduciary was found to have created an appearance of *quid pro quo* in *In re Lebedeff*.[59] During four years when Judge Lebedeff was appointing her personal accountant as a fiduciary in three instances and approving more than $21,000 in compensation, the judge was not paying the accountant for preparing her taxes (a $1200 benefit) because the accountant was not billing her.[60] The Commission concluded that, even though it was not alleged that the judge had agreed to appoint the accountant in exchange for free tax preparation services, the judge "had a duty to avoid even the appearance of receiving any financial benefits from her appointee."[61]

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tingly enriched" his girlfriend when he used taxpayer money to enable her to become a certified legal nurse consultant, which gave her a credential she could use for additional services to the legal community.

[59] Determination (N.Y. State Comm'n on Jud. Conduct Nov. 5, 2003), *at* http://www.scjc.state.ny.us.

[60] *Id.* Alice Krause had been a friend of the judge since around 1978 and had prepared the judge's tax returns since approximately 1980. *Id.* Once in 1993, once in 1996, and once in 1997, the judge appointed Krause as a fiduciary or guardian of the personal needs of an allegedly incapacitated person. *Id.* The judge advised the parties that Krause was her personal accountant, and there were no objections. *Id.* In 1997 the judge twice approved compensation to Krause for her services, $16,500 in one case and $5,393 in a second. *Id.* Although Krause had not, as of January 2003, submitted a request for payment in the third case, she had indicated that she intended to do so. *Id.* From 1980 to 1996, as a general practice, Krause prepared and contemporaneously billed the judge for her annual tax preparation services. *Id.* Krause prepared the judge's 1996, 1997, and 1998 federal and state income tax returns but did not bill the judge for those services until July 2001 after she was questioned about her relationship with the judge by the court system's Special Inspector General for Fiduciary Appointments. *Id.*

[61] *Id.* The judge was censured pursuant to an agreement. The *New York Daily News* criticized the finding of only an appearance of impropriety: "Here's how that will translate to judges, a breed ever sensitive

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In *In re Feinberg,* the New York Court of Appeals found an appearance of favoritism when a judge appointed a friend as counsel to the public administrator and then, over more than five years in 475 proceedings, awarded several million dollars in fees to that friend without applying statutory standards and without requiring substantiation.[62] After his election, the judge, without any search or interview process, appointed his friend and law school classmate, Louis Rosenthal, to replace the firm that had for several decades served as counsel to the public administrator.[63] Rosenthal had helped to raise funds for the judge's election campaign but had limited experience in surrogate's court.

The court found that the judge had a pro forma practice of awarding Rosenthal 8% of an estate's value, without attention to the actual work done. The judge did not individually review the files, he never rejected or reduced a fee request, and he never questioned a request

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to precedent: The commission will not bounce a judge unless said judge enters into a bargain with the terms written in neon. You pay me and I'll pay you back. Short of such explicit, and criminal, corruption, the commission will frown on mutual wallet-fattening amid winks among pals." Editorial, *This Watchdog Doesn't Bark or Bite,* NEW YORK DAILY NEWS, Nov. 26, 2003.

[62] 833 N.E.2d 1204 (N.Y. 2005).

[63] The public administrator administers the estates of decedents who die without a will or where there is no qualified individual who has petitioned to administer the estate. Counsel's duties include petitioning for letters of administration, marshaling the estate assets, searching for heirs, conducting kinship hearings, disposing of real property, filing tax returns, and generally representing the interests of the public administrator in all aspects of administration of estates. Counsel is paid from the assets of the estate and approved by the surrogate. In re Feinberg, Determination (N.Y. State Comm'n on Jud. Conduct Feb. 10, 2005), *available at* http://www.scjc.state.ny.us./Determinations/F/feinberg.htm

or sought additional information. The judge never required Rosenthal to submit an affidavit of legal services before approving a fee request and never considered the statutory factors for fee awards specified in the Surrogate's Court Procedure Act. Between January 1997 and December 2002, the judge awarded Rosenthal $8,613,009.35 in legal fees.

The court also found that the judge's failure to follow the statute was made more egregious by his appointment, without considering other candidates, of a close personal friend and political supporter. The court stated, "while appointment of a friend does not itself convey an appearance of impropriety, when, as here, that appointment is coupled with the unsubstantiated award of several million dollars in fees from estates that, by definition, lack adversarial parties to challenge the practice, the taint of favoritism is strong."[64]

Also in New York, Judge Ray had appointed two attorneys as guardians in a disproportionate number of cases, bypassing the rotation system through which law guardians were usually assigned by the court clerk.[65] The

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[64] In re Feinberg, 833 N.E.2d at 1209. The judge was removed from office. The court found that the judge's "repeated explanation that he 'just read through sections' or 'skimmed' the SCPA, and that his failure – over a period of more than five years – to know of and adhere to the single paragraph requirement of affidavits of legal services and individualized consideration of fee requests was an 'oversight,' demonstrate a shocking disregard for the very law that imbued him with judicial authority." *Id.* at 1208.

[65] In re Ray, Determination (N.Y. State Comm'n on Jud. Conduct Apr. 26, 1999), *at* http://www.scjc.state.ny.us. There were approximately ninety attorneys on the panel of law guardians. *Id.* In 1993 the judge gave William Maney 18% of the law guardian appointments and gave Edward Boncek 6.4% of the cases; in 1994 the judge gave Maney 17% of

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judge also routinely certified payments to the attorneys without examining the vouchers they had submitted; had the judge reviewed the vouchers, it would have been apparent to him that the attorneys were over-billing.[66] The appointments were particularly puzzling because one of the attorneys had run against the judge in 1985. Then, in January 1995, after being awarded over $88,000 in fees by the judge over two years, the attorney announced that he would not oppose the judge for a new ten-year term.[67]

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the appointments and Boncek 5.4%. *Id.* The chief clerk and the deputy chief clerk spoke to the judge about departing from the rotation of assignments and advised the judge that they were receiving complaints from other attorneys that the judge was appointing certain attorneys, particularly Maney and Boncek, to a disproportionately high number of cases. *Id.*

In 1993 the judge awarded Maney $58,177 and Boncek $20,253 in fees. *Id.* The average fee for all law guardians assigned by the judge that year was $4,434. *Id.* In 1994, the judge awarded Maney $30,660 and Boncek $13,800; the average fee that year was $3,354. *Id.* Beginning in the early 1990s, the judge received quarterly statements from the law guardian program that indicated that Maney and Boncek were receiving a disproportionately high number of assignments and a disproportionately high income from their work as law guardians in the family court. *Id.*

[66] *Id.* An audit by the Office of Court Administration revealed that between April 1, 1992, and December 31, 1995, Maney and Boncek had submitted vouchers that grossly overstated the number of hours that they had spent on cases and billed for proceedings that they did not attend or for cases in which they were not assigned. *Id.* Some of the vouchers double-billed for work. *Id.* On a number of occasions, they submitted vouchers in which they billed for more in-court hours than the court was in session. *Id.*

[67] *Id.* The other was the judge's former opponent's law partner. *Id.* The two attorneys also offered to help the judge obtain the cross endorsement of the Democratic party. *Id.* The judge accepted their offer. *Id.*

The New York Commission found that "the combination of these factors created the appearance that the lawyers were getting favored treatment from the judge. . . . [S]uch laxity, in view of the political relationship of respondent and [the attorney], creates the appearance that his serious lack of oversight may have been politically motivated."[68] The judge was censured pursuant to an agreement.[69]

Because actual favoritism seems clearly proven by the agreed facts (the disproportionate number of appointments, dodging the rotation system, rubber-stamping requests for reimbursement, the political relationship), *In re Ray* demonstrates an additional use of the appearance of impropriety standard – as a lesser included offense that facilitates "plea bargains" in disciplinary proceedings. In an agreed disposition, the appearance of impropriety standard gives the judge a face-saving way to admit with the benefit of hindsight to apparently committing misconduct without having to admit to actually meaning to do anything wrong.

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[68] *Id.*

[69] *Id. See also* In re Goodman, 649 N.E.2d 115 (Ind. 1995) (a perception that the court's business was based upon the exchange of favors arose when the judge entered into a contract with a corporation to provide services for a court program where the owner of the corporation was a close personal friend of the court administrator, hired the court administrator's son-in-law, and the owner hosted an engagement party when the judge became engaged to the corporation's in-house accountant).

C. Relationships: No Harm, No Foul?

Absence of proof that a judge actually favored an attorney or party does not preclude a finding of misconduct if a reasonable person would assume that the judge would favor the attorney or party, however unconsciously, because of a close, personal relationship. Calling "immaterial" the question whether there was a "detrimental impact" on criminal defendants, for example, the Iowa Supreme Court stated that "once the public learned" of a judge's sexual relationship with the state's attorney who appeared before him daily, "the appearance of bias was very real."[70] Thus, the court rejected Judge Gerald's argument that his misconduct was mitigated because there was no evidence that he had favored the state.[71] Instead, the court found persuasive the analysis of the Commission on Judicial Qualifications:

> What is the public to think when they learn the assistant county attorney was having a sexual relationship with a judge before whom she appeared? . . . *More importantly, what is a criminal defendant to think when the judge sentences that defendant or overrules that defendant's motion to suppress, when the assistant county attorney with*

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[70] In re Gerard, 631 N.W.2d 271, 278 (Iowa 2001).

[71] *Id.* Similarly, the New York Commission concluded that a judge's impartiality was suspect when he presided over ten cases in which mentally disabled, institutionalized patients were represented by an attorney with whom he had a romantic relationship even though in each case his decision was contrary to the attorney's position. In re DiBlasi, Determination (N.Y. State Comm'n on Jud. Conduct Nov. 19, 2001) *at* http:/scjc.state.ny.us (censure for this and other misconduct).

whom he is having a sexual relationship was arguing the case on behalf of the State?[72]

The court also held that a judge has an affirmative duty to disclose or recuse when circumstances in his life might cause someone to reasonably question his partiality.[73] The court noted that it was not the judge's "right to make these decisions for the affected parties. We agree with the commission that this 'paternalistic attitude on behalf of the judge is contrary to Iowa law.' "[74]

When a judge presides over a case involving a close friend, an appearance of partiality arises without any evidence of actual special treatment or even the expectation of special treatment. For example, in *In re Gaddis,*[75]

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[72] *Gerard,* 631 N.W.2d at 278.

[73] *Id.* at 279.

[74] *Id.* at 280. Several of the intimate encounters took place in rooms in the courthouse. *Id.* at 277. The court acknowledged that, although both the judge and the attorney were married to other people, it "normally would be loath to interfere in such personal matters." *Id.* The court held, however, that a sexual affair is regarded as improper when it involves a subordinate in a professional, highly sensitive public context. *Id.* The court suspended the judge for sixty days without pay for this and being dilatory in filing rulings and in making reports on unfinished rulings as required by a supreme court rule. *See also* In re Chrzanowski, 636 N.W.2d 758, 764 (Mich. 2001) (appearance of partiality arose despite a judge's "apparently fair disposition" of non-adversarial cases (the prosecutor was not present) in which the attorney with whom she was having an intimate relationship appeared); In re Simeone, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 6, 2004) *at* http:www.scjc.state.ny.us (a judge's romantic involvement with the director of a youth services facility raised a suspicion that his ruling was influenced by personal considerations each time he favored the position she advocated).

[75] Stipulation, Agreement and Order (Washington State Comm'n on Jud. Conduct Dec. 10, 2004), *at* http://www.cjc.state.wa.us/case%20material/2004/3855%20Stipulation.pdf.

the judge had accepted Seattle Mariners baseball tickets and a dinner from an attorney who regularly appeared before him in probate cases and depended on his exercise of discretion in approving petitions for fees and other requests.[76] In addition, the judge and his wife had a personal, social relationship with the executive director and manager of a guardianship agency whose interests were frequently before the judge.[77] The Washington State Commission on Judicial Conduct found as follows:

> While there is no evidence that either individual . . . expected or received preferential treatment from Respondent, by accepting gifts and favors, and privately socializing . . . with persons who appeared (and were likely to continue to appear) before him, the judge created at a minimum an appearance of impropriety: his conduct created a reasonable perception of partiality and legitimate concerns about whether these individuals were in a special position to influence the judge.[78]

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[76] *Id.* On two occasions, the judge accepted four Seattle Mariners baseball tickets with the cumulative face value of $232 without reimbursing the attorney. *Id.* The judge had considered the tickets to be a form of compensation for working on a manual for which the attorney was responsible. *Id.*

[77] *Id.* At a dinner scheduled for work-related purposes, the judge also allowed the attorney to purchase dinner for him and another person, the bill for which totaled $287.27. *Id.* The judge bought a meal for this attorney on at least one occasion. *Id.* According to the judge, he perceived these as professional contacts in the course of preparing continuing education materials or ordinary social interactions. *Id.*

[78] *Id. See also* Inquiry Concerning Harris, Decision and Order (Cal. Comm'n on Jud. Performance Mar. 23, 2005) at http://cjp.ca.gov.PubAdmRTF/Harris%20PA%203-23-05.rtf (although there was no evidence of actual bias, a judge's conduct in helping an attorney who regularly appeared before him "find dates could raise questions in the mind of an objective observer regarding the judge's impartiality in cases

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Moreover, an appearance that a judge is trying "to collect for past deeds"[79] can arise from actions taken by a judge after a decision is issued. In *Adams v. Commission on Judicial Performance,*[80] after awarding an automobile dealer $5 million in a complex civil case against a bank, while the case was pending on appeal, the judge entered into several business transactions with the dealer, for example, buying a used Mercedes for his wife and a used Jeep for his daughter.[81] During his case before Judge

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handled by Mr. Schonbrun"); In re D'Auria, 334 A.2d 332 (N.J. 1975) (although at no time did anyone expect or receive any preferential treatment, a judge created an obvious appearance of impropriety by frequently eating lunch in public restaurants as a guest of attorneys or representatives of insurance companies in pending matters in the judge's division); In re Lebedeff, Determination (N.Y. State Comm'n on Jud. Conduct Mar. 18, 2005) *at* http://www.scjc.state.ny.us (because of her personal and professional relationship with a plaintiff, judge's rulings in his favor raise a suspicion that she was influenced by personal considerations; censure for this and other misconduct); Office of Disciplinary Counsel v. Lisotto, 761 N.E.2d 1037 (Ohio 2002) (accepting eight tickets to attend Pittsburgh Steelers football games from an attorney who appeared in numerous cases before the judge was misconduct although there was no evidence of any favor, preference, or improper action); Office of Disciplinary Counsel v. Cox, 770 N.E.2d 1007 (Ohio 2002) (receiving loans from attorneys who regularly appeared before him was misconduct although there was no evidence that any of the attorneys received any benefit); In re Looper, 548 S.E.2d 219 (S.C. 2001) (appearance of impropriety created despite absence of evidence that judge received favorable treatment when, while traffic charges against a defendant were pending in his court, the judge went to a car dealership owned by the defendant's father, and at which the defendant was employed as a salesman, and negotiated with the defendant the trade-in of his automobile for a new automobile and purchased another new vehicle from the dealership).

[79] Adams v. Commn' on Jud. Performance, 897 P.2d 544, 554 (Cal. 1995).

[80] *Id.*

[81] *Id.* at 553-56.

Adams, the automobile dealer had been represented by Patrick Frega, and in several of the transactions, the judge relied on Frega who, without the judge's knowledge, arranged for the judge to receive favorable terms.[82]

The California Supreme Court concluded that the record did not contain clear and convincing evidence that the judge had initiated the transactions with "the expectation of receiving a financial favor"[83] from the dealer. However, the court found that, by actively soliciting the assistance of a litigant to whom he had rendered an exceedingly large monetary judgment and whose interests remained before him, the judge created an appearance of impropriety.[84]

Moreover, regardless whether he had actual knowledge of the favorable terms negotiated by Frega, the court stated, by placing himself in Frega's hands, the judge "deliberately ignored the strong possibility that Frega ultimately would arrange for the [judge] to pay less than fair market value for the Jeep. . . . The court concluded that the judge's "conduct readily could be construed as an attempt to collect for judicial services rendered in the . . . litigation, and otherwise to use his judicial office to advance his personal interests. To an objective observer, petitioner's integrity and impartiality would appear to have been placed in doubt."[86]

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[82] *Id.* at 554-55.

[83] *Id.* at 554.

[84] *Id.*

[85] *Adams*, 897 P.2d at 556.

[86] *Id.* at 556-57.

In addition, Judge Adams had accepted a sweater valued at $150 from the dealer the same year as the judgment and had attended a dinner hosted by Frega in celebration of the satisfaction of the judgment in the litigation over which the judge had presided.[87] The court found that, although the judge did not solicit the gift, "under the circumstances it was incumbent upon him to return it . . . to avoid any doubt regarding the judge's independence or any appearance of impropriety." Finally, the court concluded

> regardless of the judge's motives, or of whether he was biased or impartial in the judicial proceedings involving the . . . litigation, his attendance at the dinner given in celebration of the satisfaction of the judgment in the . . . litigation indisputably gave rise to the appearance of partiality in favor of a litigant and his attorney whose very substantial interests had come before him.[89]

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[87] *Id.* at 559-61.

[88] *Id.* at 560.

[89] *Id.* at 557. Similarly, the New York Court of Appeals found that a judge had created the "damaging impression that his judicial decisions were influenced by personal profit motives" when he directed that nearly a quarter of a million dollars in infants' funds be deposited in a credit union from which he received preferential treatment on interest, including interest-free loans. In re Cohen, 543 N.E.2d 711 (N.Y. 1989). The court removed the judge. *See also* In re Voetsch, Determination (N.Y. State Comm'n on Jud. Conduct Aug. 17, 2005), at http://www.scjc.state.ny.us (a part-time judge created the appearance that his employment as a real estate broker was a reward for favorable action when he accepted employment from an individual who had recently been a successful litigant in his court and from the family of a defendant to whom he had recently given a lenient sentence).

D. Associating with Criminals

The Louisiana Supreme Court concluded that a judge's extra-marital affair with a felon on parole from a prison sentence that the judge had imposed suggested "improper influence, whether or not such exists," creating an appearance of impropriety.[90] The relationship had been publicized in a lengthy article in the *Baton Rouge Advocate*. The court concluded

> [a]lthough it is not illegal to associate with known criminals, when a judge, who has sworn to uphold the law, enters into an intimate relationship with a convicted felon whom she sentenced in her court, the public's perception of such a relationship causes disrespect for the judiciary and falls below the standard the public has a right to expect.[91]

In New Jersey, Judge Blackman attended a picnic two days before his host, a friend of the judge for eighteen years, was going to begin a two-and-one-half year prison sentence for racketeering.[92] The picnic was widely publicized and attended by 150 to 200 people. Newspaper accounts interpreted the judge's attendance as support for

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[90] *In re Harris*, 713 So. 2d 1138, 1141 (La. 1998).

[91] *Id.* In deciding not to remove the judge, the court emphasized that Judge Harris had not exercised improper control over the treatment of the felon after imposition of sentence or intervened favorably on his behalf in the parole process. *Id.* at 1141 n.7. *See also* Comm'n on Jud. Performance v. Milling, 651 So. 2d 531, 536 (Miss. 1995) ("A justice court judge openly living with a fugitive from another state charged with several drug related felonies without a doubt creates an 'appearance of impropriety.'"); In re Jones, 581 N.W.2d 876 (Neb. 1998) (removal for, in addition to other misconduct, having close contacts with people the judge had placed on probation).

[92] In re Blackman, 591 Aid 1339 (N.J. 1991).

the felon, a former local official, and characterized the event as a going-away party.[93]

The New Jersey Supreme Court concluded that the judge's attendance at the picnic "could be perceived as evidencing sympathy for the convicted individual or disagreement with the criminal justice system that brought about the conviction," noting "such conduct may raise questions concerning the judge's allegiance to the judicial system" and "generate legitimate concern about the judge's attitude toward judicial responsibilities, weakening confidence in the judge and the judiciary."[94] Acknowledging that the judge did not act with an improper motive, the court stated the judge's "presence at the party was the subject of public scrutiny, not his feelings of friendship.[95]

> As a judge, respondent had a duty to foresee that his actions might be open to criticism by the press or members of the public. Even if such criticism might be a misinterpretation of his motives, respondent nonetheless had an obligation to avoid any conduct that might lead to such criticism. By putting his personal feelings ahead of his responsibility as a judge and attending the party, respondent conducted himself improperly and exhibited insensitivity and poor judgment. He conveyed the wrong image of the judiciary.[96]

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[93] *Id.* at 1342.

[94] *Id.* at 1341-42.

[95] *Id.* at 1342.

[96] *Id.*

The "going away" party was in 1990, six months after the court had publicly reprimanded two judges for attending the Governor's Inaugural Ball with their spouses, two years after the New Jersey Advisory Committee on Extra-Judicial Activities had issued an opinion warning judges not to attend a dinner to honor a prosecutor on his or her reappointment, and fifteen years after a judge had been sanctioned for frequently being a luncheon guest of attorneys in pending matters. In light of those authorities the court stated, Judge Blackman should have known that "a judge who attends a public or social event will be perceived as endorsing or supporting not only the event itself but also persons associated with the event."[97]

E. Statements: "Just Kidding"

The appearance of impropriety standard has been used to foil a judge's attempt to negate the obvious import of a statement that casts doubt on the basis on which the judge reached a decision.

In *In re Best*,[98] for example, the judge, in a case in which a defendant charged with battery was representing himself, asked the courtroom audience, "If you think I ought to find him not guilty, will you stand up?"[99] Then, he asked, "If you think I ought to find him guilty, stand up."[100] The judge then found the defendant guilty.[101]

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[97] *Id.*

[98] 719 So. 2d 432 (La. 1998).

[99] *Id.* at 434.

[100] *Id.*

[101] *Id.*

Conceding that he should not have asked the audience to vote, the judge argued that his conduct was not sanctionable because his guilty verdict was based on the evidence presented at trial and he had only wanted to "involve the public in the judicial process."[102] In fact, no one in the audience had stood up after either request by the judge.[103] Rejecting the judge's argument, the Louisiana Supreme Court stated

> [w]hether or not Judge Best actually based his verdict on the audience's vote does not determine whether or not his conduct is sanctionable. The mere fact that he asked the courtroom audience to vote on the guilt of the defendant gave the impression that Judge Best based his verdict on something other than the evidence presented at trial. This type of behavior destroys the credibility of the judiciary and undermines public confidence in the judicial process.[104]

In re Schiff[105] also involved statements by a judge that suggested he was making a decision based on something other than the facts or the law. A part-time judge who also practiced law had dismissed traffic charges filed against the driver of a car who had been in an auto accident with Judge Schiff.[106] After learning of the dismissal, Judge Schiff remarked to the arresting officer, "It's a wheel. It goes around and maybe someday I can do the same for

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[102] *Id.* at 435.

[103] *Id.*

[104] *Best,* 719 So. 2d at 435-36; *see also* In re Daniels, 340 So. 2d 301 (La.1976) (censure for giving the appearance of deciding the guilt or innocence of several defendants by flipping a coin).

[105] 635 N.E.2d 286 (N.Y 1994).

[106] *Id.* at 287.

him."[107] Judge Schiff also told an attorney he was so angry at the part-time judge that he intended to grant the plaintiff's motion for judgment in a case in which the defendant was represented by the part-time judge's law firm.[108] The judge did grant judgment for the plaintiff but argued in discipline proceedings that he had done so on the merits.[109] The New York Court of Appeals concluded that argument was "largely irrelevant to the charge. . . ."[110] The court stated that

> the harm inured when he indicated he would use his judicial powers to satisfy a personal vendetta, a classic instance in which "an appearance of such impropriety is no less to be condemned than is the impropriety itself." Petitioner created the impression that he was using his judicial office to retaliate, and thus failed to avoid the appearance of impropriety and to conduct himself in a manner that promotes public confidence in the impartiality and integrity of the judiciary.[111]

Similarly, in *In re Cunningham*,[112] the New York Court of Appeals censured a county court judge who had told a city court judge in a letter that he would never change a sentence the city court judge had imposed, stating: "You can do whatever you want to whenever you want to & I'll agree with you . . . I take the position that you know the

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[107] *Id.*

[108] *Id.* at 288.

[109] *Id.*

[110] *Id.*

[111] *Schiff*, 635 N.E.2d. at 288 (quoting In re Spector, 392 N.E.2d 552, 554 (N.Y. 1979)). The judge was removed for this and other misconduct.

[112] 442 N.E.2d 434 (N.Y. 1982).

case and as sentencing judge you can do whatever you damn well please."[113]

Emphasizing that a judge must view matters on their merits alone without regard to public or professional disapproval, the court stated that a judge must also avoid creating the appearance that he or she "would decide a matter before him in any other manner."[114] Noting the record did not indicate that Judge Cunningham "actually abrogated his appellate duty to review matters before him on the basis of their merits alone," the court concluded that, regardless whether Judge Cunningham was influenced by his concern about the other judge's criticism, his letter constituted judicial misconduct because he created "the appearance that he might be prejudging certain matters."[115]

After sentencing in a drunk-driving case, a California judge evaluated the deputy district attorney's performance, telling her she had done well but needed to be prepared to adjust her strategy after an unanticipated

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[113] *Id.* at 435. When Judge Cunningham learned that the city court judge was upset that he had signed an order to show cause in a case, he wrote a second letter stating that "if I catch the appeal, I will affirm, as always, on a judge's discretion." *Id.*

[114] *Id.*

[115] *Id.* at 436. Judge Cunningham had in fact overturned one of the city judge's sentences on appeal. *Id.* Judge Cunningham was censured. *See also* In re Mulroy, 731 N.E.2d 120, 122-23 (N.Y. 2000) (a judge's statement that Utica was a "fucking black hole" and he wanted to get back to Syracuse because it was "men's night out" created the appearance that he was pressuring the prosecutor to agree to a plea bargain even if it was, as he claimed, "banter;" the judge was removed for this and other misconduct).

ruling.[116] Referring to his exclusion of the defendant's pre-field sobriety statements, the judge stated that he knew that the statements were admissible but kept them out to see how the young prosecutor would handle herself.[117] The California Commission on Judicial Performance found that the judge's statement gave the appearance that he had decided a legal issue to teach a lesson to a new lawyer, noting that the judge failed to appreciate how his choice of words implicitly suggested that his ruling was questionable if not wrong.[118]

Finally, based on a stipulation and agreement, the Washington Commission reprimanded a judge for writing "NTG" on hundreds of defendants' judgment and sentence forms, generally understood to be an acronym for "Nail This Guy."[119] The judge maintained that "NTG" meant "Note This Guy (or Gal)," and that he used the initials as a private method to remind him of which cases he believed deserved closer scrutiny should he be required to review that person's sentence following a reported violation of sentencing condition.

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[116] Inquiry Concerning VonVoorhis, Decision and Order (Cal. Comm'n on Jud. Performance Feb. 27, 2003) *at* http:cjp.ca.gov/CN%20removals/VanVoorhis%202-27-03.rtf.

[117] *Id.*

[118] *Id.* The Commission removed the judge for this and ten additional instances of improper courtroom demeanor. *Id. See also* In re Smith, Determination (N.Y. State Comm'n on Jud. Conduct June 26, 1998) *at* http://www.scjc.state.ny.us/determinations/s/smith,m.htm (a judge created the appearance of bias against the prosecution by engaging in ill-placed humor, minimizing charges before her, and making remarks concerning the reliability of prosecution witnesses.)

[119] In re Burns, Stipulation, Agreement, and Order of Reprimand (Wash. State Comm'n on Jud. Conduct June 8, 2004) *at* www.cjc.state.wa.us.

The judge acknowledged, however, that it was widely rumored among court employees and attorneys who practiced in his court that the initials meant "Nail This Guy" and that he contributed to that rumor by making statements to others that would cause them to believe that was what the letters stood. Although the objective evidence did not establish actual bias or prejudice or that the judge prejudged a particular case, the judge acknowledged that some parties, counsel, and staff could have understood that he had prejudged cases and intended to treat some defendants harshly, cruelly, or inappropriately in the future. The agreement stated

> [t]he Code of Judicial Conduct deals not only with subjective intent, but also with appearances. Whatever Respondent may have intended "NTG" to mean, his words and conduct led others to believe "NTG" meant "Nail This Guy." By writing "NTG" on some defendants' judgment and sentence forms, generally understood to be an acronym for "Nail This Guy," Respondent created the appearance he was biased or prejudiced against those individuals he intended to "nail." Public confidence in the integrity and impartiality of the judiciary is undermined when a judge's conduct creates the perception that a case has been pre-judged or that there is a bias against a party, regardless of whether the perceived bias or prejudice exists. Persons who believed Respondent wrote "Nail This Guy" in code on some defendants' judgments could reasonably conclude that those defendants received, or would receive, disparate or unfair treatment from the court.

F. Manifestations of Bias

An Illinois judge, during one of several intemperate exchanges, said "when I'm talking to you boy, you look at me," to an adult African-American defendant in a criminal case.[120] The judge admitted that this was discourteous but denied that it was a manifestation of bias, arguing he did not say "boy" with any racial intent or to demean the defendant.[121] The judge presented over one hundred letters from people who knew him in his professional capacity stating they had never heard him make a racially biased remark.[122]

The Illinois Courts Commission acknowledged that the term "boy" directed at an African American was offensive but found that "the term itself is not objectively racist and thus does not necessarily indicate racial bias or prejudice."[123] Therefore, it concluded that the Judicial Inquiry Board had not proved that the judge had manifested bias or prejudice in the exercise of his judicial duties.[124]

In contrast, in *In re Ellender*,[125] the Louisiana Supreme Court considered whether a white judge's appearance in black face at a party created an appearance of bias

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[120] In re Golniewicz, Order (Ill. Courts Comm'n Nov. 14, 2004).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* The Commission removed the judge from office for this instance and two additional instances of intemperate conduct and using his parents' address to run for office when his permanent abode was outside the sub-circuit in which he was running. *Id.*

[125] 889 So. 2d 225 (La. 2004).

even absent evidence the judge was prejudiced in his decision-making. Judge Ellender had attended a Halloween party at a restaurant dressed in an orange prison jumpsuit and handcuffs, black face, and a black afro wig.[126] Most of the people at the restaurant were party guests, but there were five or six additional diners; the restaurant remained open for take out, and the staff of the restaurant, including an African-American employee, was also present.[127] Apparently, one of the witnesses reported the incident to the local newspaper, and on November 9, there was an article entitled "Local judge's masquerade sparks racial concerns."[128] Local broadcast media picked up the story, followed by CNN and two New Orleans television stations.[129] The local office of the NAACP received calls complaining about the judge's Halloween masquerading.[130] The Judiciary Commission received six complaints, including complaints filed by the NAACP, the judge's colleagues on the bench, and one of the justices of the Louisiana Supreme Court.[131]

The judge admitted the factual allegations and agreed that he had violated Canons 1 and 2A, which require a judge to uphold the integrity and independence of the judiciary and require that a judge shall respect and

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[126] *Id.* at 227. The choice of costumes was intended to be humorous by implying that the judge's new wife, who reportedly was young and attractive and was dressed as a police officer, had her husband under her control. *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 227-28.

[131] *Ellender*, 889 So. 2d at 228.

comply with the law, but did not agree that that his conduct was demeaning towards African-Americans. The district attorney's office reviewed the judge's docket but did not find any disparity in the judge's sentencing based on race.[132] Four African-Americans testified before the Commission that Judge Ellender is a good judge whom they consider fair and impartial.[133]

The Louisiana Supreme Court agreed with the Commission's finding that the judge's conduct "called into question his ability to be fair and impartial towards African-Americans who appear before his court as defendants in criminal proceedings, as well as towards any African-American litigant or attorney in any proceeding before him, thereby creating the appearance of impropriety."[134] Although agreeing that the judge did not intend to offer an affront to the African-American community, the court concluded that "his behavior exhibits his failure to appreciate the effects of his actions on the community as a whole."[135]

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[132] *Id.* at 232.

[133] *Id.*

[134] *Id.* at 229.

[135] *Id.* at 233. The court suspended the judge without pay for one year but deferred six months of the suspension on the condition that the judge enroll in a course at one of the local universities that will allow him "to gain insight into the attitude of other racial groups, particularly racial groups where interrelations are marked by antagonism, discrimination and conflict." *Id. See also* In re Sardino, 448 N.E.2d 83 (N.Y. 1983) (referring to defendants as "creatures," calling one defendant a "maniac," and similar statements at arraignment "could only create the impression in the mind of the public that [the judge] was predisposed against those defendants who appeared before him if not defendants generally" even if he did not actually harbor any bias); In re Schenck, 870 P.2d 185, 198 (Or. 1994) (off-bench statements

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IV. THE TEST

The commentary to Canon 2 of the ABA Model Code of Judicial Conduct states that "the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[136] Similar iterations are "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence,"[137] whether a reasonable person would question the impartiality of the court,[138] and whether the conduct would "have a negative effect on the confidence of the thinking public in the administration of justice."[139] A finding of an appearance of impropriety is

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about a prosecutor such as "she has placed herself in a position for which she has neither the training or experience to perform the duties competently" created the impression that the judge would be biased in favor of the state in order to make up for the alleged incompetence of the district attorney). *But see* In re Nakoski, 742 A.2d 260 (Pa. Ct. Jud. Dis. 1999) (finding a judge did not commit misconduct when, in response to the question "It's not unlawful or illegal to be a black man, is it?" asked in a continuing education program, the judge said "Yes" and "They're all in jail. They're the ones doing all the robberies and burglaries").

[136] Canon 2A (1990). *See, e.g.*, In re O'Bier, 833 A.2d 950, 957 (Del. Ct. Jud. 2003) (by displaying a weapon in a way that made two court clerks feel their safety was threatened and persistently carrying his weapon while at work in a way that the weapon was clearly visible to the public and employees, a judge created "the perception that his ability to carry out his judicial responsibilities with integrity, impartiality and competence was impaired").

[137] Cal. Code of Jud. Ethics, Canon 2A. cmt.

[138] In re Snow, 674 A.2d 573, 577 (N.H. 1996).

[139] In re Bonin, 378 N.E.2d 669, 683 (Mass. 1978).

often based on a combination of factors and the cumulative effect of the circumstances.[140]

In a literal approach to the appearance of impropriety standard, judicial discipline cases often start with the improprieties defined in the code[141] and then proceed if an actual violation is not proven to consider whether an appearance of a violation was created. In other words, if "notwithstanding the absence of proof of any actual or intended impropriety," whether the judge's conduct "inescapably created a circumstantial appearance of impropriety."[142] Similar pronouncements of the rule provide that an appearance of impropriety is established if a reasonable person would be justified in suspecting that the judge violated the code,[143] in having an "undispelled suspicion" of actual impropriety,[144] or in believing that "an impropriety is afoot."[145]

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[140] *See, e.g., supra* discussion of In re Ray at text accompanying notes 65-69 and In re Johnstone at text accompanying notes 50-56.

[141] Commentary to Canon 2A provides that "actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code."

[142] In re Spector, 392 N.E.2d 552, 555 (N.Y.1979).

[143] In re Chaisson, 549 So. 2d 259, 263 (La 1989).

[144] In re Johnstone, 2 P.3d 1226, 1237 (Alaska 2000).

[145] In re Inquiry Concerning a Judge, 788 P.2d 716, 723 (Alaska 1990). The most expansive definition of the standard explains:

> Because conduct that necessitates a full-scale inquiry to allay public suspicion itself suggests impropriety, an impermissible appearance also might be found – regardless of whether an investigation eventually dispelled suspicion of actual misconduct – if readily avoidable conduct foreseeably caused reasonably intelligent and informed members of the public to demand a full inquiry into suspected impropriety.

In re Johnstone, 2 P.3d 1226, 1237 n.38 (Alaska 2000).

For example, an actual impropriety in *Kennick v. Commission on Judicial Performance*[146] would have been proven if one of the attorneys with whom the judge met alone in chambers admitted that they had had ex parte communications about the case in which they were appearing that day on the judge's calendar. Even absent that direct evidence of ex parte communications, however, the California Supreme Court found that the judge's practice of having social visits with two favored attorneys on days when they were appearing in his court gave rise to an appearance of impropriety, in other words, an appearance of ex parte communications.[147]

A crucial element of the appearance of impropriety standard as interpreted by the judicial discipline authorities is the consideration of whether the conduct was readily avoidable,[148] in other words, whether there were reasonable precautions the judge could have taken to avoid creating the appearance of impropriety.[149] For example, in *In re*

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[146] 787 P.2d 591 (Cal. 1990).

[147] *Id.* at 609-10. *See also* In re Slusher, Stipulation, Agreement, Order of Admonishment (Wash. Comm'n on Jud. Conduct Apr. 1, 1994), *at* http://www.cjc.state.wa.us/case%20material/1994/1518%20stipulation.pdf (finding a violation of code of judicial conduct where a judge engaged in a casual and cordial conversation in the courtroom with one of the parties in a case that the other party observed, while the attorneys for both parties were discussing settlement outside the courtroom even though there was no evidence that the judge discussed the proceeding); In re Huttner, Determination (N.Y. State Comm'n on Jud. Conduct July 5, 2005) *at* http://www.scjc.state.ny.us (even if a judge and attorney did not discuss the merits of the case the attorney was handling before the judge during their out-of-court meetings, the appearance of impropriety was inevitable, compounded by the judge's eleven fiduciary appointments to the attorney).

[148] *Johnstone*, 2 P.3d at 1237 n.38.

[149] In re Inquiry Concerning a Judge, 788 P.2d at 723.

Bonin,[150] the Massachusetts Supreme Judicial Court held that the chief justice of a superior court had created an appearance of impropriety by failing to make inquiries about a meeting he was planning to attend at which Gore Vidal would be speaking on "Sex and Politics in Massachusetts."[151] If the judge had made those inquiries, he would have learned that the meeting was a fund-raiser to benefit defendants in criminal cases, alleging sex acts between men and boys, in the court in which he was chief justice although the cases were not assigned to him.[152]

The court noted that it would be an impropriety for a judge to attend a meeting knowing that the proceeds "were to be used as a defense fund or knowing that pending cases would be the subject of partisan comment."[153] Therefore, the court concluded, "it was likewise an impropriety, although a lesser one, for the Chief Justice, in his impatience or rashness, to fail to take heed of information and warnings which would have brought more definite knowledge to him if he had considered or pursued them seriously."[154] Similarly, an appearance of impropriety could have easily been avoided if Judge Ellender had gone to the

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[150] 378 N.E.2d 669 (Mass. 1978).

[151] *Id.* at 685.

[152] *Id.* A newspaper had carried a picture of the chief justice at the meeting on the front page with a headline, "Bonin at benefit for sex defendants." *Id.* at 680. The newspaper had a story and, on page three, a picture of the chief justice with Gore Vidal. *Id.* At the meeting, there was also discussion of the pending cases, the harassment of gay people by the district attorney and the police, and the current "witchhunt" and "show trials." *Id.* at 679.

[153] *Id.* at 682.

[154] *Id.* The judge was censured for this and other misconduct. *Id.* at 685.

Halloween party in a Spiderman costume,[155] if Judge Adams had returned the sweater from the car dealer,[156] if Judge Feinberg had read and followed (not just "skimmed") the Surrogate's Court Procedure Act,[157] or if Judge Mosley had used personal stationery in his letter to his son's school.[158]

The model code does not describe the reasonable person who is the subject of the appearance of impropriety test. Cases have described the reasonable person as "a reasonably intelligent and informed member of the public,"[159] "an objective observer,"[160] and "the average person encountered in society."[161] Other formulations emphasize what a reasonable person is not: not the judge himself or herself,[162] not a well-trained lawyer,[163] not a highly sophisticated observer of public affairs,[164] and not a cynic skeptical of the government and the courts.[165] Perhaps the most evocative variation characterizes the reasonable person as

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[155] *See supra* discussion of *In re Ellender* at text accompanying notes 125-35.

[156] *See supra* discussion of *Adams v. Comm'n on Jud. Performance* at text accompanying notes 80-90.

[157] *See supra* discussion of *In re Feinberg* at text accompanying notes 62-64.

[158] *See supra* discussion of *In re Mosley* at text accompanying notes 42-43.

[159] *Johnstone*, 2 P.3d at 1237 n.38.

[160] *Adams*, 897 P.2d at 548.

[161] *Inquiry Concerning a Judge*, 822 P.2d at 1340.

[162] *Snow*, 674 A.2d at 577 (quoting *Blaisdell v. City of Rochester*, 609 A.2d 388, 390 (N.H. 1992)).

[163] *Inquiry Concerning a Judge*, 822 P.2d at 1340.

[164] *Id.*

[165] *Id.*

"neither excessively indulgent, nor excessively jaundiced."[166]

Further, the reasonable person would not be "uninformed or misinformed,"[167] and the perception of an impropriety must be based on more than vague conjectures and subtle innuendo.[168] Realistically, however, a reasonable person could not know "every conceivably relevant fact"[169] but would know "all available information,"[170] "all the relevant circumstances that a reasonable inquiry would disclose,"[171] or the "totality of circumstances."[172]

One factor the reasonable person could not be presumed to know is the judge's subjective motive or state of mind.[173] Thus, "whatever [the judge's] motive, it is no cure for conduct that creates an appearance of impropriety."[174] A judge's explanation for his or her conduct "may shed light

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[166] In re Larsen, 616 A.2d 529, 584 (Pa. 1992).

[167] *Id.* at 582.

[168] *Id.* at 584.

[169] *Inquiry Concerning a Judge,* 822 P.2d at 1340. *But see* CAL. CODE OF JUD. ETHICS, Cannon 2A cmt. ("The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence").

[170] *Johnstone,* 2 P.3d at 1237 n.38.

[171] DEL. CODE OF JUD. CONDUCT, Canon 2A cmt. ("The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.")

[172] *Larsen,* 616 A.2d at 584.

[173] *Blackman,* 591 A.2d at 1341.

[174] *Snow,* 674 A.2d at 578.

on his after-the-fact, subjective belief," but it does nothing to eliminate the appearance arising from the objective record.[175] For example, a reasonable person could not know whether Judge Golniewicz was actually unbiased when he called an African-American defendant "boy,"[176] whether Judge Gerard was actually able to overlook his sexual relationship with the prosecutor when he ruled in her cases,[177] or whether Judge Johnstone actually would have thought the person he chose was the best person for the coroner position even if the chief justice had not suggested the candidate.[178]

Similarly, a reasonable person would not know the subjective state of mind of other persons implicated in the judge's conduct. For example, a reasonable person could not know whether the charges against Judge Pennington's son would have been dismissed even if the judge had not met with the prosecutor[179] or whether the car dealer would have given the same deals he gave to Judge Adams to someone who had not just entered a multi-million dollar judgment in his favor.[180]

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[175] *Johnstone,* 2 P.3d at 1237.

[176] *See supra* discussion of *In re Golniewicz* at text accompanying notes 120-24.

[177] *See supra* discussion of *In re Gerald* at text accompanying notes 70-74.

[178] *See supra* discussion of *In re Johnstone* at text accompanying notes 50-56.

[179] *See supra* discussion of *In re Pennington* at text accompanying notes 30-32.

[180] *See supra* discussion of *In re Adams* at text accompanying notes 79-89.

Moreover, if a judge's conduct is not public, suspicions are more reasonable and an appearance of impropriety more likely because what actually happened cannot be known by the reasonable person and the absence of misconduct would have to be taken on faith. For example, because the conversations took place in private, whether Judge Kennick was actually discussing cases with the attorneys in his chambers[181] or whether Judge Chaisson really pressed for a favorable settlement[182] is inherently unknowable by the reasonable person and, therefore, irrelevant to the question whether there was an appearance of impropriety.

V. CRITICISM OF THE STANDARD

A. Chilling effect

The argument that the appearance of impropriety standard "chills courageous and innovative judicial decision-making"[183] is contradicted by the case-law. The cases in which a judge has been disciplined for a legal error or abuse of discretion (which are exceptions to the usual rule that mere legal error does not constitute misconduct[184]) do not rely on the Canon 2 appearance language. Instead, those cases are based on the Section 2A requirement that a judge "respect and comply with the law," the Section

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[181] *See supra* discussion of *In re Kennick* at text accompanying notes 146-47.

[182] *See supra* discussion of *In re Chaisson* at text accompanying notes 33-39.

[183] APRL comments, *supra* note 13.

[184] *See* Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245 (2004).

3B(2) injunction "to be faithful to the law and maintain professional competence in it," or the Section 3B(7) obligation to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Moreover, as the previous discussion of the case-law demonstrates, none of the cases applying the appearance of impropriety standard are based on the substance of a judge's decision but on surrounding conduct that makes it harder to accept the integrity of that decision.

Furthermore, the element of the test that permits a finding only when the judge did not use reasonable care to prevent an appearance of impropriety ensures that the standard cannot be applied to sanction a judge for the substance of a decision. In cases in which a judge is "duty-bound to take actions or make rulings that will predictably stir public controversy, . . . duty certainly must prevail over appearance: when duty requires a judge to take controversial action, it would be logically untenable and morally repugnant to suggest that the judge should be sanctioned merely because the action raises a public clamor."[185]

B. Vagueness

The primary attack on the appearance of impropriety standard is that the language is unconstitutionally vague and overbroad.[186] Reservations about the standard expressed

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[185] *Johnstone*, 2 P.3d at 1237.

[186] APRL argues that the standard places "judges at risk of disciplinary action depending upon the whim of judicial disciplinary authorities." APRL comments, *supra* at note 13. That accusation is grossly unfair to judicial disciplinary authorities, the commissions

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before the standard was first adopted in 1972, however, are not persuasive because subsequent experience has disproved their premise.[187] In light of the tests, limits, and definitions applied by the commissions and courts in the discipline cases in the past thirty years, the "appearance of impropriety" language would survive a vagueness challenge. A "statute or rule is not unconstitutionally vague merely because it does not specifically designate the various different means by which it is violated."[188] Rules setting guidelines for members of a profession such as lawyers and judges "need not meet the precise standards

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comprised of experienced attorneys, respected lay community leaders, and judges who are normally accused of being too soft on judges, not capriciously hard. Further, the final authority in state judicial discipline cases (in all but a few states) is the state supreme court, not an arbitrary body subject to fads and quirks. The risk to judges posed by the appearance of impropriety standard is apparently slight as APRL does not cite any cases it considers to be an unfair application of the standard although judges have allegedly been subject to the "whim" of judicial disciplinary authorities since at least 1972. In fact, of the over 30,000 states court judges in the United States, in 2004, for example, only eighteen judges (or former judges) were removed from office (ten additional judges resigned in lieu of discipline pursuant to agreements with judicial commissions that were made public) and only eighty-six additional judges (or former judges) were publicly sanctioned. Most of those cases did not involve findings of an appearance of impropriety but of an actual violation of the different sections of the code. While those statistics do not prove the commissions are ineffective, neither do they give any support for the argument that the commissions and courts are enforcing the appearance of impropriety standard (or indeed any provision of the code) in a capricious or draconian fashion.

[187] APRL cites the 1969 comments of former United States Supreme Court Justice Arthur Goldberg that Canon 2 is "unbelievably ambiguous." *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings on S. 1097 and S. 2109* Before the Subcomm. o. Separation of Powers of the Senate Comm. on the Judiciary, 91st Congress (1969).

[188] In re McGuire, 685 N.W.2d 748, 762 (N.D. 2004).

of clarity that might be required of rules of conduct for laymen."[189] Application of a vagueness analysis depends on the context, and judges, like lawyers, are professionals who have the benefit of guidance provided by case law, court rules, the "lore of the profession,"[190] "the traditions of the judicial profession," and "its established practices."[191]

"[N]ecessarily broad standards of professional conduct" are constitutionally permissible if they reflect the fundamental principle of professional responsibility.[192] Under this analysis, the rule defining attorney misconduct to include "conduct prejudicial to the administrative of justice"[193] – a phrase no more precise than "the appearance of impropriety" – has been to held to meet due process requirements.[194]

Moreover, the necessarily general provisions of the code of judicial conduct[195] have withstood vagueness challenges. In *In re Hill,*[196] for example, the Missouri

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[189] In re Keiler, 380 A.2d 119, 126 (D.C. 1977).

[190] Howell v. State Bar of Texas, 843 F.2d 205, 208 (5th Cir. 1988) (quoting In re Snyder, 472 U.S. 634, 645 (U.S. 1985)).

[191] Committee on Legal Ethics of the West Virginia State Bar v. Douglas, 370 S.E.2d 325, 328 (W.V. 1988).

[192] In re Charges Against NP, 361 N.W.2d 386, 395 (Minn. 1985) (quoting In re Gillard, 271 N.W.2d 785, 809 n.7 (Minn. 1978)).

[193] Model Rules of Prof'l Conduct R. 8.4(d) (2003).

[194] *NP,* 361 N.W.2d at 395; *Keiller,* 380 A.2d at 126 (D.C. 1977); *Douglas,* 370 S.E.2d at 328 (W.V. 1988); *Howell,* 843 F.2d at 208 (5th. Cir. 1988); In re Stanbury, 561 N.W.2d 507, 512 (Minn. 1997).

[195] Commentary to Canon 2 explains that "because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code."

[196] In re Hill, 8 S.W. 3d 578 (Mo. 2000).

Supreme Court rejected the judge's argument that Section 2A and Section 2B did not give adequate notice of proscribed conduct and did not protect against arbitrary enforcement. (Section 2A provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Section 2B provides: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.")

The court noted that the "test for determining whether the Canons are vague is whether they convey to a judge a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice."[197] The court stated that "neither absolute certainty nor impossible standards of specificity are required," especially in judicial discipline, where the purpose is "not to punish criminal conduct, but rather to maintain standards of judicial fitness."[198] The court also concluded that a judge was protected against arbitrary enforcement because violations of the canons were only evidence of misconduct and, ultimately, the court had to find that the judge violated the constitutional standard of misconduct before discipline could be imposed.[199]

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[197] *Id.* at 582.

[198] *Id.*

[199] *Id.* at 583. *See also* McGuire, 685 N.W.2d at 762 (rejecting arguments that Canons 1A, 2 and 3B(4) are unconstitutionally vague); In re Ritchie, 870 P.2d 967, 973 (Wash. 1994) (court's careful reading of Canons 1 and 2 led to rejection of judge's argument that he did not

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Similarly, in *In re Complaint Against Harper*,[200] the Ohio Supreme Court held that Section 2A and Section 7B(1)(a) "provided reasonable opportunity for regulated persons to know what conduct was prohibited, and were also explicit enough to prevent arbitrary enforcement, they are not subject to attack under the vagueness doctrine."[201] (Section 7B(1)(a) states, "An incumbent judge, or a candidate for judicial office should maintain the dignity appropriate to judicial office.") The court reasoned, "like the military, fire and police departments, and civil service, the judiciary is a specialized community governed by a specific discipline and body of rules."[202] The court also noted that "sanctions like public reprimands, that [sic] are applied for violation of the Canons of Judicial Ethics, are more civil or administrative than criminal."[203] Finally, the court stated

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know that mischaracterizing activities for which he sought reimburse was improper).

A federal district court did hold that the appearance of impropriety provision in Canon 2 as well as the general provisions in Canon 1 were unconstitutional, but that decision was vacated on appeal on abstention grounds. *Spargo v. New York State Comm'n on Jud. Conduct*, 244 F. Supp. 2d 72 (N.D. N.Y. 2003), *vacated*, 351 F.3d 65 (2d Cir. 2003). Even if the decision had not been vacated, the district court's analysis would be irrelevant; because the conduct at issue involved political activities, the district court applied a much stricter constitutional analysis than would ordinarily apply to a constitutional challenge to Canon 2. Moreover, the district judge's holding was premised on his belief that only "murder and mayhem, or bribery" "plainly denigrate the integrity and independence of the judiciary," an unsupportable assertion that indicates his decision that the canons violated due process was as ungrounded as his overturned decision that abstention was not required.

[200] 673 N.E.2d 1253 (Ohio 1996).

[201] *Id.* at 1264.

[202] *Id.*

[203] *Id.*

that "fair warning of the prohibited conduct existed" in an advisory opinion, pre-existing case law, custom, and usage.[204]

C. Difficulty

A review of the cases discussed above suggests that the problem is not that judges believed that a reasonable person would not think their conduct improper, but that they did not even try beforehand to consider a perspective other than their own. However, it has been argued that judges could not know what would violate the appearance of impropriety provision because it requires they, who do not stand outside the system, "imagine how a reasonable, well-informed observer of the judicial system would react."[205] As "a dispenser rather than a recipient or observer of decisions," this argument maintains, "the judge understands how professional standards and the desire to preserve one's reputation often enforce the obligation to administer justice impartially, even when an observer might be suspicious."[206] A related argument is that the

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[204] *Id.* In re Hey, 452 S.E.2d 24 (W.V. 1994), the West Virginia Supreme Court of Appeals held that the state's interests were sufficiently served by the specific prohibitions on judges' speech in the code and that the general prohibitions in Canons 1, 2, and 3 may not be used to punish judges for public remarks that do not violate either a specific prohibition or some other law. *Id.* However, the court stated, "This is not to say that Canons 1 and 2 are facially unconstitutional. . . ." *Id.* at 33.

[205] APRL comments, *supra* at note 13, quoting In re Mason, 916 F.2d 384, 386 (7th Cir. 1990). APRL neglects to quote the remainder of the analysis in which the court appears to credit judges' ability "to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be." *Id.*

[206] *Id.*

standard imposes an unfair stress on judges that "tends to undermine their own sense of worth."[207]

That argument suggests that judges have been elevated to such a lofty position that they can no longer conceive of the opinion of the reasonable non judge, reflecting an arrogance that most judges do not share and that corrodes public confidence in the judiciary. The appearance of impropriety standard provides a needed antidote to that arrogance by requiring judges to develop a habit of thought that considers an objective view. The reasonable person standard is familiar to judges from a variety of contexts, and while it may be difficult for them to imagine what a reasonable person might think, they should know that they at least have to try as a necessary corrective to the subjectivity of their own evaluation of their own conduct.

Further, judges are not without guidance in determining what creates an appearance of impropriety. Judges can and should turn to their colleagues, family, and friends for advice like most people do. Moreover, judges can refer to existing case-law and advisory opinions for guidance about what the reasonable person might think. Given the numerous cases on the topic, for example, no judge could claim surprise that gratuitously referring to the judicial office or using judicial stationery in private business creates an appearance of impropriety.

Moreover, there are judicial ethics advisory committees in most states and for federal judges that will advise a judge, either informally or in writing, whether the judge's

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[207] *Spector*, 392 N.E.2d at 558 (Fuchsberg, J., dissenting).

contemplated conduct is an impropriety or creates an appearance of impropriety. These opinions do not necessarily bind the judicial discipline authorities, but asking provides a judge with the perspective of the objective, reasonable persons who make up the committee and compliance with an opinion provides a good faith defense in disciplinary proceedings. When judicial stationery may appropriately be used, what gifts may be accepted, what functions are not appropriate to attend, whether to preside in a case involving an individual with whom a judge has a relationship, and whether to appoint a particular person are precisely the types of questions advisory committees frequently address.[208]

D. Comparisons to Standards for Lawyers

In 1969 the ABA Model Code of Professional Responsibility used "avoid the appearance of impropriety" as the title of a rule prohibiting a former government lawyer from accepting certain private employment and from stating or implying "that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."[209] In addition, "avoid the appearance of impropriety" was one of the canons or "axiomatic norms" from which disciplinary rules were derived[210] and was

[208] *See* http://www.ajs.org/ethics/eth_advis_comm_links.asp.

[209] Model Code of Prof'l Responsibility DR 9-101 (1969).

[210] Model Code of Prof'l Responsibility Canon 9 (1969). In the Model Code of Professional Responsibility, canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived." *Id.* at Preliminary Statement.

included in several "ethical considerations" or aspirational principles.[211] Accepting arguments that a more specific rule was needed, the ABA eliminated the appearance of impropriety standard when it replaced the Model Code of Professional Responsibility in 1983 with the Model Rules of Professional Conduct.[212]

Thus, one of the arguments used to support deleting the appearance of impropriety standard from the model code of judicial conduct is to bring the rules for judges in line with the rules for lawyers.[213] The easy and decisive answer to that argument is that judges should be held to higher ethical standards than lawyers. While lawyers may have a hard time balancing the beliefs of a reasonable person about impropriety with their obligation to be an advocate for a client, judges do not have that conflict because acting with an integrity that promotes public confidence in judicial decisions is their primary ethical responsibility. Moreover, it is a judge's job to apply general laws to specific facts, and it is not unfair to ask judges to aspire to avoid the appearance of impropriety and to sanction judges who fail to do so.

In addition, the reasons for deleting the standard from the Rules of Professional Responsibility do not apply to the

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[211] Model Code of Prof'l Responsibility EC 9-3, EC 9-6. In the Model Code of Professional Responsibility, ethical considerations "are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." *Id.* at Preliminary Statement.

[212] *See* Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rules be Eliminated in New Jersey – Or Revised Everywhere Else?* 28 SETON HALL L. REV. 315 (1977).

[213] *See* APRL comments, *supra* note 13.

code of judicial conduct. Comment 5 to the pre-Ethics 2000 version of Rule 1.9 explained that the appearance of impropriety standard was deleted because, under the standard, "disqualification would become little more than a question of subjective judgment by the former client."[214] However, the standard in the code of judicial conduct is the reasonable person standard, not a subjective standard. Comment 5 also argued that because "'impropriety' is undefined, the term 'appearance of impropriety' is question-begging."[215] In contrast, the code of judicial conduct does define impropriety; commentary to Canon 2 states that "[a]ctual improprieties under this standard include violations of law, court rules or other specific provisions of this Code."[216]

Finally, attempts to downgrade the appearance of impropriety language in the code of judicial conduct to only an insignificant, unenforceable title are unconvincing.[217] Canon 2 is a complete, declaratory sentence in contrast to the sentence fragments that comprise the titles in the Model Rules of Professional Responsibility. "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities" is not comparable to "Competence," for example, the title of Rule 1.1 of the Model Rules. Moreover, the preamble to the model code makes no

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[214] *Id.*

[215] *Id.*

[216] Model Code of Prof'l Responsibility Canon 2.

[217] *See* Eileen C. Gallagher, The ABA Revisits the Model Code of Judicial Conduct 44 NO. 1 Judges' J. 7 (Winter 2005) ("Although the directive to avoid the appearance of impropriety has existed in the Model Code for decades, the provision has only been found in the canon's title, not in its individual sections").

reference to "titles" but expressly states that "the text of the Canons . . . is authoritative."

E. The Specter of *Spector*

In re Spector[218] is often cited in discussions of the appearance of impropriety standard, largely on the eloquence of the dissenting opinion. In that case, the New York Court of Appeals considered the conduct of a judge who had appointed the sons of two other judges as guardians ad litem, receivers, and referees while those other judges were appointing his son to similar positions.[219] The State Commission on Judicial Conduct had found that the judge was aware of the appointments of his son being made by the other judges although there was no "*quid pro quo*" understanding.[220]

The court stated "nepotism is to be condemned, and disguised nepotism imports an additional component of evil because, implicitly conceding that evident nepotism would be unacceptable, the actor seeks to conceal what he is really accomplishing."[221] The court concluded "participation in the pattern of cross appointments gave an appearance of impropriety, in effect permitting the inference that each of the Judges involved was by this means securing appointments for his own son."[222] The court stated, "Notwithstanding the

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[218] 392 N.E.2d 552 (N.Y. 1979).

[219] *Id.* Judge Spector had appointed the Judge Fine's son while Justice Fine appointed Judge Spector's son eight times. Judge Spector appointed Judge Postel's son ten times while Justice Postel appointed Judge Spector's son five times. *Id.* at 552-53.

[220] *Id.* at 553.

[221] *Id.*

[222] *Id.* at 554.

absence of proof of any actual or intended impropriety there was thereby inescapably created a circumstantial appearance of impropriety."[223]

The dissenting justice did not object to the Commission's enforcement of the appearance of impropriety standard "where appropriate,"[224] although noting "the need to invoke the canon with great restraint."[225] The dissent stated that "[u]nderstandably, no Judge can respond with less than pride to the flattering proposition that more may be expected of Judges than of ordinary mortals."[226] The dissent argued, however, that the "'appearance of impropriety' concept is beset by legal and moral complexity. The concern is with what can be a very subjective and often faulty public perception."[227]

> Indeed, lack of specificity as to what conduct makes a Judge vulnerable to a charge of appearance of impropriety may bear serious due process implications. Leaving the rules expected to be observed unidentified is bound to burden our Judges with uncertainty as to whether what is acceptable today will be deemed aberrant tomorrow. Putting men and women who have to judge the rights of others under such undeserved stress tends to undermine their own sense of worth. Our legal system should treat those who preside over it with more regard.[228]

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[223] *Id.* at 555. The judge was admonished.

[224] *Spector*, 392 N.E.2d at 556 (Fuchsberg, J., dissenting).

[225] *Id.* at 555 (Fuchsberg, J., dissenting).

[226] *Id.* (Fuchsberg, J., dissenting).

[227] *Id.* (Fuchsberg, J., dissenting).

[228] *Id.* at 557 (Fuchsberg, J., dissenting).

The focus of the dissent's disagreement with the majority was that there was no specific rule prohibiting judges from appointing other judges' family members, and custom allowed the personal preferences of the appointing judge to govern the selection of referees, guardians ad litem, and others.

> To apply a current perception of impropriety retrospectively as the basis for the finding that acts that were once regarded as proper when performed are now to be classified as improper is fundamentally wrong. To do so exacts from the petitioner expiation for the legal community's failure to have articulated and imposed a clearer standard in the past.[229]

However, the crux of the majority opinion was not that Judge Spector had appointed the other judges' sons,[230] but that his appointments in combination with their appointments of his son would make reasonable people believe that the three judges had agreed to avoid the restriction on nepotism by a *Strangers on a Train* maneuver.[231] Even assuming there was no agreement or unspoken understanding, Judge Spector knew of the other judges' appointments of his son and, therefore, should have known

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[229] *Id.* at 556 (Fuchsberg, J., dissenting).

[230] Judges are in fact allowed to appoint other judges' family members in cases. *See* New York Advisory Opinion 03-19, *at* http://www.nycourts.gov/ip/judicialethics/Opinions/03-119_.htm.

[231] In Alfred Hitchcock's classic 1952 movie, Bruno agrees to kill Guy's wife while Guy agrees to kill Bruno's father (at least Bruno thinks Guy agreed to do so). Because Bruno and Guy have no connection with each other, other than the chance encounter on the train, and neither has any connection to the person they plan to kill. Bruno figures each will be rid of a burden without the police being able to tie either to the crimes.

that an appearance of cross nepotism would be created if he appointed their sons. The appearance could easily have been avoided; the judge could simply have appointed other attorneys.

The majority responded to the dissent's arguments:

> Reluctance to impose a sanction in this case would be taken as reflecting an attitude of tolerance of judicial misconduct which is all too often popularly attributed to the judiciary. To characterize the canonical injunction against the appearance of impropriety as involving a concern with what could be a very subjective and often faulty public perception would be to fail to comprehend the principle. The community, and surely the Judges themselves, are entitled to insist on a more demanding standard. . . . It would ill befit the courts and the members of the judiciary to suggest that Judges are to be measured against no higher norm of conduct than may at times and in some places unhappily have been perceived as reflecting the mores of a judicial marketplace.[232]

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[232] *Spector*, 392 N.E.2d at 555. Even if the majority's decision is seen as cynical, that cynicism has been more than borne out in the years after the decision in *Spector* by the chronic scandals involving fiduciary appointments in New York that have resisted numerous reforms. *See Fiduciary Appointments in New York*, A Report to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman (Dec. 2001), *available at* http://www.courts.state.ny.us/ip/gfs/igfiduciary.html.

VI. CONCLUSION

Holding judges to the highest standards of conduct is not flattery but their part of the bargain in which the public has granted them independence. At a time when judges are accused of being unaccountable, the judiciary must be answerable to the public's ethical expectations. To counteract accusations of arrogance, judges must be humble in ethical matters and eschew any claims of entitlement. At a time when judges are defending their freedom to make decisions regardless of clamor by the public or pressure from politicians, judges must demonstrate their commitment to maintaining public confidence in the integrity and impartiality of those decisions by considering how the public might reasonably view their conduct. The appearance of impropriety standard, both as a symbol and an enforcement tool, is an essential component of that effort and perfectly comprehensible by a thoughtful judge and readily embraced by an upright judge.

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No. 06-1629

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IN THE

Supreme Court of the United States

THE HONORABLE RICHARD B. SANDERS,

Petitioner,

v.

THE WASHINGTON STATE
COMMISSION ON JUDICIAL CONDUCT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF

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REPLY TO COMMISSION'S FACTUAL ALLEGATIONS

In its brief, the Washington State Commission on Judicial Conduct (the "Commission"), alleges that Justice Sanders has attempted to mislead this Court. However, it also concedes that "[t]he facts in this case are largely uncontested and, for the most part, they are accurately set forth in the petition to this Court." Brief in Opposition, p. 6. Rather, it is the Commission that attempts to spin the facts in order to avoid the weakness in its position regarding the constitutional deficiencies of the appearance of impropriety as a standard for discipline and the operation of a one-tier structure for a judicial disciplinary agency.

The most glaring example of this appears on page 16 of its brief when the Commission states: "In stark contrast, the incarcerated sexual predators at the McNeil Island Penitentiary were felons who had no right to vote in judicial or any other elections." The Commission goes on to argue on the same page that Justice Sanders received documents from "disenfranchised felons," and introduced topics of conversation at issue "in their cases then pending before his court."

Justice Sanders was not at the McNeil Island Penitentiary. He visited the Special Commitment Center (the "SCC"). The SCC is not a penal institution. It houses sexually violent predators who have been civilly committed. There is no basis for the assertion that no resident of the SCC had voting rights. In addition, SCC staff was also present when Justice Sanders met with the residents. Presumably those individuals had the legal right to vote.

Furthermore, the notion that a judge only has free speech rights with respect to voters, and not with the public at large, is offensive. Even those citizens of Washington who cannot vote, such as children, are still subject to the judicial process. They have a right to interact with public officers and voice their

concerns, even if they cannot speak at the ballot box. As a public officer and an employee of the citizens of Washington, any Washington judge who insisted only on speaking with those members of the public who could vote might be accused of the same appearance of impropriety Justice Sanders faces now.

Nor is there any basis to imply that all the residents of the SCC had cases "pending" before the Washington Supreme Court. They did not. The only case which was "pending" was *In re Detention of Thorell,* 149 Wn.2d 724, 72 P.3d 708 (2003) involving the small number of SCC residents discussed in Justice Sanders' petition. Contrary to the representation on page 1 of the Commission's brief that Andre Young had a case pending before the Washington Supreme Court, Mr. Young had filed a petition for review by that Court, which was denied. Merely filing a petition for review does not mean a case is pending if the court does not accept the case.

As noted on page 5 of Justice Sanders' petition, no factual issues regarding control of sexual urges were before the Washington Supreme Court. Only the issue of whether the determination that a sexually violent predator lacks behavioral control must be found separately by the jury, based upon a jury instruction was before the Court. *Thorell,* 72 P.3d at 713.

As the petition makes clear, although Justice Sanders was invited by the African American Collective, the tour was set up through the superintendent of the SCC. Although he received two documents from SCC residents, one was a newsletter generally available. The other document did not relate to any matter before the Court, and contrary to the assertion on page 6 of the Commission's brief, Justice Sanders disclosed to the Attorney General's office the document he received from an SCC resident.

The entire thrust of the Commission's factual recitation about what Justice Sanders did and argument based upon it is

essentially that some improper ex parte communication occurred. Yet, the Commission and the Washington Supreme Court specifically *acquitted* Justice Sanders on that charge.

The Commission's response also omits one significant fact and is incorrect about another in regard to the one-tier disciplinary structure. It asserts on page 21 that Justice Sanders received all of the documents "that formed the basis of the Commission's finding of probable cause." It omits that only the Commission determines what evidence it considers formed the basis of probable cause. Its rules and structure prohibit an accused judge from determining whether there was anything more. The Commission also asserts on page 22 of its brief that the Washington Supreme Court granted interlocutory review of Justice Sanders' discovery requests. Actually, the Washington Supreme Court denied interlocutory review, allowing Justice Sanders only the discovery the Commission chose to give him. The assertion the one-tier system is acceptable because Washington Supreme Court review is de novo ignores the fact that it only considers the record shaped by the Commission below.

THE NEW MODEL ABA CODE DOES EXPAND THE APPEARANCE OF IMPROPRIETY STANDARD

In its brief in opposition, the Commission claims that the new Model Code of Judicial Conduct promulgated by the American Bar Association ("ABA") does not expand the scope of the appearance of impropriety by transforming it from a hortatory standard to a rule that is a basis for discipline. The Commission's argument is apparently predicated on a letter of the New York Judicial Prosecutor Robert Tembeckjian (Brief in Opposition appendix 1) and a New York *Times* editorial which

appeared after he went to the newspaper (Brief in Opposition appendix 3).[1]

The Commission's brief incorrectly states that "an eleventh-hour attempt" was made to radically change the Model Code. The Commission ignores the history of the Model Code and the deliberative process the recent Joint Commission engaged in before recommending to the ABA House of Delegates that the appearance of impropriety be removed as a basis for discipline.

In redrafting the Code of Judicial Conduct (hereinafter the CJC), the ABA began with its 1990 version of the CJC. In the 1990 Code, the appearance of impropriety never appeared in any subsection dealing with specific judicial conduct. It was only contained in the broad language of Canon 2. The ABA itself says Canon 2 in the 1990 code was merely "aspirational." The Annotated Model Code of Judicial Conduct, published by the ABA states: "Two of the Canons are aspirational (Canons 1 and 2), and the other three address specific types of judicial conduct . . ."ABA, Annotated Model Code of Judicial Conduct 4 (2004).

As the Joint Commission began its work in redrafting the CJC, the issue of whether the appearance of impropriety should be a basis of discipline was discussed throughout the nearly four year process. The Association of Professional Responsibility Lawyers (the "APRL"), an independent national organization of lawyers practicing in the fields of professional responsibility, legal ethics, and the law of lawyering, submitted a detailed analysis of the appearance of impropriety standard in a letter to the ABA Joint Commission on June 30, 2004.

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[1] The fact that there was a New York Times editorial on the subject underscores the immediacy of this issue and the need for this Court to speak on the issue of the appearance of impropriety standard as a basis for discipline.

See discussion pages 6 through 14 in appendix A. The APRL states:

> Despite all this, our own analysis of the law, as well as the experience of those of our members who serve as attorneys defending judges and lawyers against disciplinary charges, has led us to conclude that the AOI Requirement collides with the standards of basic fairness and due process that must apply when the Code is used to discipline judges.

App. A at 7. The APRL added:

> As long ago as 1969, former United States Supreme Court Justice Arthur Goldberg, echoing the sentiments of former Justice (and Former Attorney General) Tom Clark as well as several law professors characterized Canon 2 as "unbelievably ambiguous," and stated that "to avoid the appearance of impropriety, it helps both the public and the judge to know the guidelines."

App. A at 9.

In its drafting process, the Joint Commission created a draft Code and sent it out for comment. The draft tried to compromise on the issue of whether Canons – where the appearance of impropriety standard appeared in the draft, – were enforceable for discipline purposes. The proposed draft in the Scope section provided that a Canon could be enforceable for discipline purposes only if there was a finding of a violation of an underlying rule.

The formulation met disapproval from the ethics and discipline experts within the ABA, the Standing Committees on Ethics and Discipline. The Ethics Committee stated:

> The Standing Committee (Ethics) does not believe that the Canons – particularly Canon 1, referring to the so-called "appearance of impropriety" – should *ever* be the basis for the imposition of judicial discipline, whether standing alone or when charged in conjunction with a Rule.

App B at 1. (Committee's emphasis).

Similarly, the Standing Committee on Professional Discipline rejected making the appearance of impropriety an enforceable disciplinary standard. In its letter to the Joint Commission, the Discipline Committee proposed changing the Scope section to make clear that Canons, where the appearance of impropriety was located, were not enforceable for discipline purposes. It stated:

> The Committee (Discipline) believes that deleting the phrase "for violating a Canon" from paragraph (2) accomplishes this goal. While individual jurisdictions may decide to take a different approach, the Committee believes that the ABA should, as it did with the Model Rules of Professional Conduct, take the leadership position that only alleged violations of the Rules should be investigated and charged so as to form the basis for the imposition of any discipline.

App. C at 2.

Before finalizing its report to the House of Delegates, the Joint Commission considered the comments of the legal professionals best equipped to analyze this issue: the Ethics

Committee, the Discipline Committee, and the APRL. The Joint Commission concluded that Canons, and the appearance of impropriety, should not be the basis of discipline. All Commission members were allowed to vote on the issue. Mr. Tembeckjian was not a Commission member, and served as a representative of judicial prosecutors providing their perspective throughout the process, so he was certainly not an impartial "advisor" regarding the CJC.

However, the controversy Mr. Tembeckjian stirred up eventually led the House of Delegates to place the appearance of impropriety standard into a specific rule. Thus, the ABA has gone from its 1990 Code which had the appearance of impropriety as "aspirational," in a Canon, to a specific rule which is the basis for discipline. As Justice Sanders appropriately noted in the petition, this certainly is an expanded version of the appearance of impropriety, at least for the Model Code.

Interestingly, while clinging to the argument that everything in the Washington CJC is mandatory for discipline purposes, even when the Code uses the word "should" instead of "shall," the Commission concedes on page 9 of its brief that the Code is "a largely aspirational document." The fact that the Commission itself cannot differentiate between aspirational and mandatory standards, buoys Justice Sanders' legal arguments.

A RECENT RELATED DECISION IN THE SANDERS MATTER HEIGHTENS THE CHILLING EFFECT ON JUDICIAL SPEECH

Since Justice Sanders' petition for certiorari was filed, the Washington Court of Appeals issued a decision heightening the chilling effect the decision of the Washington Supreme Court for judicial speech. After being prosecuted by the Commission, Justice Sanders brought a declaratory judgment action seeking representation by the Washington Attorney General in the

judicial disciplinary proceeding. The Attorney General's office, which was instrumental in having Justice Sanders' visit to the SCC monitored and reported on by law enforcement, refused to defend him although he was being prosecuted for actions in his capacity as an elected state judicial official.

On June 12, 2007, the Washington Court of Appeals upheld the Washington Attorney General's denial of a defense to Justice Sanders, requiring him to personally bear his defense costs. In *Sanders v. State of Washington,* 159 P.3d 479, 485 (Div. II, 2007), the Court held that the attorney general can pick and choose which judges to defend initially:

> Thus, the attorney general has the discretion to provide a defense initially or instead to reimburse an accused judge for his or her defense costs later if the judge is exonerated of ethical wrongdoing.

Being subject to a judicial disciplinary proceeding can cost a judge thousands of dollars in attorney fees to defend a charge of unethical conduct. The vagueness and ambiguity of the appearance of impropriety standard allows judges to be charged with, and convicted of, unethical conduct not based upon what they actually did, but how it might *appear* to someone. Now, with a ruling that no defense need be provided and reimbursement costs are only allowed if the judge prevails, unless the judge can afford thousands of dollars per charged "offense," the best course for any judge to follow is to say nothing at all. The heightened chilling effect on judicial speech is obvious. Justice Sanders' petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — LETTER TO THE ABA COMMISSION ON THE MODEL CODE OF JUDICIAL CONDUCT DATED JUNE 30, 2004

June 30, 2004

ABA Commission on the Model Code of Judicial Conduct
c/o Mark Harrison, Esq.
Osborn Maledon, P.A.
2929 North Central Avenue
Suite 2100
Phoenix, AZ 85012-2794

Dear Colleagues:

The Association of Professional Responsibility Lawyers (APRL) is an independent national organization of lawyers practicing (and often concentrating) in the fields of professional responsibility, legal ethics, and the law of lawyering generally. Our membership includes law professors, bar counsel, counsel for respondents in disciplinary cases, expert witnesses and consultants, litigators involved on both sides of cases raising legal ethics issues (including without limitation legal malpractice cases), in-house ethics counsel for law firms, and in-house counsel to corporations and other entities, including insurance companies.

Consistent with this diverse membership, APRL frequently speaks out on issues of vital importance to the legal profession, especially as they affect our areas of practice and concentration. With respect to the ABA Commission on the Model Code of Judicial Conduct (the "ABA Commission"), APRL President Ronald E. Mallen of San

Appendix A

Francisco appointed a committee to formulate a response to the original request for public comment made by the ABA Commission in November 2003. That committee is chaired by Ronald C. Minkoff of New York, New York and includes Murray Abowitz of Oklahoma, Elizabeth Alston of Mandeville, Louisiana, Dianna M. Anelli of Columbus, Ohio, Warren Lupel of Chicago, Illinois, Peter Ostermiller of Louisville, Kentucky and Suzanne Westerheim of Dallas, Texas. The committee has considered not only prior commentary and case law, but also the ABA Commission's May 2004 Draft (the "Preliminary Draft") of Proposed Canons 1 and 2. The committee's recommendations, embodied in this letter, have been approved by the APRL Board of Directors.

Preliminarily, APRL recognizes that the Model Code of Judicial Conduct (the "Model Code") seeks to embody general principles regarding the all-important role judges play as neutral decision-makers in our judicial system. In doing so, however, the Model Code performs multiple functions. First, and maybe even foremost, it is exhortatory, setting forth the basic standards of honesty, fairness, impartiality and integrity that judges must maintain in order to ensure the judicial system maintains the trust and confidence of those who come before it, and of the general public. Second, the Model Code sets forth rules that serve as the basis for professional discipline. These two functions do not fit together easily, and that should not be surprising: broad general principles, important to establish and maintain public confidence, often are not sufficiently specific to provide judges with clear notice as to what conduct (or misconduct) may subject them to disciplinary sanction. Many of our

members have learned this through hard experience, representing judges in disciplinary matters in several different states. Those experiences inform our recommendations.

Consistent with our membership's expertise, we have attempted to focus on three specific areas which deal directly with the representation of judges in matters involving the Model Code, and which we believe the current Model Code does not adequately address.

Reporting Impairments

First, APRL is concerned that under present Canon 3(D)(1), judges who "receive information indicating a substantial likelihood" that one of their colleagues may have a substance abuse problem or another impairment that raises serious questions as to the colleague's fitness for office are required (a) to report the colleague only if the colleague's impairment causes him or her to violate a specific provision of the Model Code; and (b) to make that report to "the appropriate authority." To the extent that the current rule may be interpreted as limiting the reporting requirement to actual Code violations, and as requiring the report to be made to the impaired colleague's superior or to a disciplinary authority, we are concerned that this may discourage judges from reporting judicial impairments to an established judicial or lawyers assistance program, thus causing harm to the impaired judge as well as to litigants, the Bar and the public at large.

Accordingly, we applaud Proposed Canon 2.19, which is very similar to the proposal regarding judicial assistance

programs made by the ABA Commission on Legal Assistance Programs ("CoLAP"), and which (with some wording changes) will satisfactorily addresses our concerns. Where our proposal differs from Proposed Canon 2.19, we have placed Proposed Canon 2.19's language in brackets with italics:

> "A judge having personal knowledge that the performance of a lawyer or another judge may be impaired by drugs or alcohol or other mental, emotional or physical condition, shall take [or initiate] corrective *[appropriate]* action, which may be satisfied by *[include]* a confidential referral to an appropriate lawyer or judicial assistance program."

Our proposal differs from Proposed Canon 2.19 in three ways. We believe a judge should have personal knowledge of the impairment before a reporting requirement is triggered. In addition, we believe the requirement of taking "appropriate" action is too ambiguous: it suggests that judges, most of whom are untrained in addressing drug and alcohol addiction or potential mental illness, will be subject to discipline if they do not take action which, in hindsight, disciplinary authorities and their hired experts view as "appropriate." We prefer the word "corrective," because it suggests that a judge will satisfy his or her reporting obligation by taking *any* steps to correct the problem. Similarly, we prefer the phrase "may be satisfied by" to "may include." While we recognize that there may be instances in which a judge is so impaired that a referral to a judicial assistance program ("JAP") alone may not be sufficient to

protect the public, we wish to ensure that a judge who takes the brave step of alerting a JAP about a colleague will not be disciplined because — again in the bright light of hindsight — someone later determines the reporting judge did not act forcefully enough.

Communications with Ethics Counsel

Second, we are concerned that the Model Code does not adequately address the circumstances in which judges may seek independent legal advice regarding their own obligations under the Model Code, including whether and when this advice may be sought on an *ex parte* basis. APRL members often receive telephone calls from judges seeking advice, and the line between permissible and impermissible advice is not clear. The APRL Board respectfully submits that this issue should be addressed in the Code or its comments, and that judges should be able to seek independent advice privately, except where litigants already have raised the ethical issue in the pending litigation. Thus, we propose the following as a new Canon 3(B)(7)(f) (or, using the formulation from the May 2004 Draft, Proposed Canon 2.09(a)(5)):

> (f [based on current lettering]) A judge may seek confidential legal advice as to the judge's own rights and responsibilities under this Code or [name of professional responsibility code for attorneys in the relevant state], unless the matter about which the judge is seeking advice has already been the subject of a motion or other application before the judge in the proceeding, in

> which case the judge must give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.

We are well aware that this proposal does not address *ex parte* communications in the traditional sense. In Canon 17 of the original Canons of Judicial Conduct, *ex parte* communications were defined as "private interviews, arguments or communications designed to influence [a judge's] judicial action, where interests not affected thereby are not represented before him." But the prohibition on *ex parte* communications in current Canon 3(B) — and, for that matter, in Proposed Canon 2.09 — goes far beyond this: it includes not just "*ex parte* communications" between a judge and one of the parties to the litigation, but also "other communications made to the judge outside the presence of the parties concerning a pending or impending matter." Thus, the current and proposed Canons prohibit a judge from discussing "pending or impending matters" with a third party, unless the third party is a "disinterested expert," another judge or "court personnel whose function is to aid in the judge in carrying out his judicial responsibilities." Canon 3(B); Proposed Canon 2.09 (a)(2) and (3).

This creates a problem for judges and lawyers when judges need certain types of legal advice. To illustrate, we use three examples:

(a) Judge A is the son of a Holocaust survivor, and is asked to serve as the keynote speaker at a charitable dinner by a Holocaust survivor's organization;

(b) Judge B is presiding over a lawsuit, in which the plaintiff has moved to recuse her because of her husband's ownership of substantial stock in the defendant corporation; and

(c) Judge C works in a relatively small city. From time to time, a local criminal defense lawyer, who has strong political affiliations in Judge C's own party, appears on matters in his court, but has nothing pending currently. On the last few occasions when the lawyer appeared before Judge C, however, the judge had noticed that the lawyer slurred his words and smelled of alcohol. Since then, other courthouse personnel have told him the same thing about the lawyer. Last night, Judge C saw the lawyer drink several beers at a party. Judge C wants to know whether he is obligated to report the lawyer to a Lawyers Assistance Program, but is concerned about tarnishing the lawyer's reputation and damaging his own political future.

Judge A obviously may speak to a lawyer about his legal problem without implicating Canon 3(B); there is no "pending or impending matter" involved, and thus no improper communication. But the other two examples raise far more complex problems under the current Code.

Judge B's case sits at the other extreme from Judge A's. By seeking legal advice about a matter raised in a pending motion, Judge B is engaged in a "communication . . . outside

the presence of the parties concerning a pending or impending proceeding," and is thus violating Canon 3(B) of the Model Code. Many of our members have reported that when addressing this situation, they treat it as falling under the Canon 3(B)(7)(b) exception for a communication with a "disinterested expert," which would permit them to advise the judge only if the judge discloses the advice to the parties. Telling a judge about the need to disclose usually discourages him or her from going further, but it is not analytically correct under the Code: A lawyer whom the judge wishes to retain is not necessarily a "disinterested expert;" to the contrary, he or she is a retained attorney with a client to protect. And while Judge B may be entitled, under Canon 3(B)(7)(c), to consult with court personnel or other judges in this situation, she may not find this satisfactory; given the high stakes and personal nature of the dispute, she may want her own, more expert counsel to protect her reputation.

The Model Code or its comments should make clear that Judge B may seek independent counsel in this situation. Public policy should support ensuring that Judge B gets the best possible advice in this situation, so as to ensure the integrity of the legal process is maintained. As already noted, under the Model Code — as well as Proposed Canon 2.09(a)(2) — she would be permitted to consult a "disinterested expert" on virtually any issue, but commentators have questioned the quality of advice she would receive:

> "Consultation with a 'disinterested expert' may not be as valuable as it appears. With law teachers, for example, expertise about an issue may be more

> illusory than real. Frequently, the expert offers the advice in a casual manner lacking the seriousness of the judge who must decide the case. Finally, the advice sought from the alleged 'disinterested' expert may instead be from someone who has a specific partisan interest in the issue of the outcome of the case." *See* L. Abramson, "The Judicial Ethics of Ex Parte and Other Communications," 37 Hou. L. Rev. 1343, 1373-74 (Winter 2000) (hereafter, "Ex Parte Communications").

Obviously, a judge's consultation with knowledgeable, retained ethics counsel involves none of these problems, and would provide Judge B with the advice she needs. Equally obviously, the demands of due process require that Judge B disclose to the parties the advice she receives. *See, e.g., Time Warner Entm't Co. v. Baker,* 647 So. 2d 1070, 1072 (Fla. Dist. Ct. App. 1994) (judge must tell the parties the identity of the expert and the substance of the communication). Accordingly, we have included that requirement in our proposal.

Judge C's situation is even less clear than Judge B's under the current Code. His communications with ethics counsel, though not an *ex parte* communication in the traditional sense, will implicate Canon 3(B), because it involves a "communication . . . outside the presence of the parties concerning a pending or impending matter." Ex Parte Communications at 1358-59 (distinguishing between "ex parte communications" and "other communications" clauses, and saying both are covered by Canon 3(B)). While

some may argue that Judge C's problem does not involve a "pending or impending matter," that phrase has been interpreted broadly enough to cover this situation, given that Judge C can reasonably foresee that the lawyer will be assigned to his courtroom again in the near future. *See id.* at 1359 (Canon 3(B) implicated if "the judge has information relating to a particular fact situation that is likely to be filed in the foreseeable future, particularly in that jurisdiction"); A. Kaufman, "Judicial Ethics: The Less-Often Asked Questions," 64 Wash. L. Rev. 851, 858-59 (1989) (Canon 3(B) implicated if judge serves as law school moot court judge on issues likely to come before her). With no action pending, Judge C could not invoke the "disinterested expert" exception, and the practicalities of the situation might make him reluctant to invoke the exception allowing him to speak to other judges or court support personnel. Although some jurisdictions provide help lines and other support systems for judges with ethical problems, the current Comments to Canon 3(B)(7) limit permissible communications to "law clerks or other personnel on the judge's staff," suggesting that communications to others, including judicial support offices, are prohibited.

Accordingly, we propose that the Model Code or the Comments address this situation, and allow judges to obtain legal advice from retained outside counsel without disclosure to real or potential parties. Indeed, we believe that such communications should freely be permitted at any point before a party makes a formal motion or otherwise raises the ethical issue with the court. In addition to addressing concerns on reporting obligations, this would permit judges to obtain

candid, expert advice on disqualification issues, speaking to the press about particular cases or attorneys, and other matters.

Appearance of Impropriety

Third, our concerns regarding Canon 2's requirement that judges avoid the "appearance of impropriety in all of [their] activities" (the "AOI Requirement") stems from our general perception that vague and overbroad language should be removed from the Model Code of Judicial Conduct because it presents too great a risk of subjective interpretation, placing judges at risk of disciplinary action depending upon the whim of judicial disciplinary authorities. Beyond the troubling implications for the due process rights of judicial officers, the public at large also loses, because vague and overbroad standards of judicial conduct inevitably chill courageous and innovative judicial decision-making.

In entering this debate, we are mindful that the AOI Requirement is included in the judicial conduct codes of most states. *See* L. Abramson, "Canon 2 of the Code of Judicial Conduct," 79 Marq. L. Rev. 949, 950 n.3 (Summer 1996) (hereafter, "Canon 2 Article"). The AOI Requirement serves the "institutional" purpose of ensuring "the avoidance of stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system from the actions of a judge." C. Gray, "Canons 1 and 2," 25 Judicial Conduct Reporter, Vol. 3 at 4 (Fall 2003) (hereafter, "Gray"). Thus, at least one court has noted that the AOI Requirement "is as important to developing public confidence in the judiciary as avoiding impropriety itself." *In re Dean,* 717 A.2d 176

(Conn. 1998). Public commentators have recently been vociferous in their view that the AOI Requirement must remain in the Code, and must be vigorously enforced. "Weakening the Rules for Judges," *New York Times*, May 22, 2004 (critiquing current ABA Commission draft because it "actually weaken[s] the core provision that requires judges to avoid . . . the appearance of impropriety").

Moreover, the AOI Requirement has repeatedly been used in judicial discipline in order to support sanctioning a wide variety of conduct, from making false and misleading statements in public and private contexts [*see, e.g., In re Ferrara*, 582 N.W.2d 817 (misrepresentations at press conference)], to inappropriate sexual behavior or personal relationships [e.g., *Mississippi Comm'n v. Gilling*, 651 So. 2d 531 (Miss. 1995) (living with person judge knew was a fugitive and assisting with his case)], to improper judicial appointments [*Spector v. Comm. On Judicial Conduct*, 47 N.Y.2d 462, 418 N.Y.S.2d 565 (1979)], to inappropriate political activity [*Spargo v. N.Y. State Comm. On Judicial Conduct*, 244 F.Supp.2d 72, *rev'd other grds*, 351 F.3d 65 (2d Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 4047 (U.S. Supreme Court, June 7, 2004). *See*, Gray, *supra*, compiling cases. Judges and judicial prosecutors who have worked with the AOI Requirement for many years, and undoubtedly have become comfortable with it, have already expressed their support for the AOI Requirement to the ABA Commission.

Despite all this, our own analysis of the law, as well as the experience of those of our members who serve as attorneys defending judges and lawyers against disciplinary charges, has led us to conclude that the AOI Requirement

collides with the standards of basic fairness and due process that must apply when the Code is used to discipline judges.

We begin with the simple fact that the A.B.A. rejected the inclusion of the prohibition of conduct creating an "appearance of impropriety" as a disciplinary rule in the Model Rules of Professional Conduct. As stated in Comment [5] to the pre-Ethics 2000 version of Rule 1.9:

> "This rubric [the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility] has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety."

Indeed, the AOI Requirement has been roundly criticized in the contexts of attorney discipline and disqualification. In January of this year, in *State v. Davis,* 840 A.2d 279 (N.J. Super. 2004), a New Jersey state appellate court, upholding the trial court's denial of a motion to disqualify an attorney in a criminal case, cited with approval the following words

of the New Jersey commission appointed by the state's Supreme Court to review the Rules of Professional Conduct:

> "The appearance of impropriety provisions in the RPC's seek to reduce the risk of improper conflicts. Because of their vagueness and ambiguity, those provisions, however, are not appropriate as ethics standards."

The *Davis* court, agreeing with the commission, held that, at most, the AOI standard was one of many factors to be considered in the overall disqualification analysis. *See also In re Entertainment, Inc., 225* B.R. 412 (N.D. Ill. 1998) (the appearance of impropriety is a "vague concept of disqualification" and not applicable in the Northern District of Illinois); *Adoption of Erica,* 426 Mass. 55, 686 N.E.2d 967 (Mass. 1997) (favorably citing the *Law of Lawyering* that the appearance of impropriety has been described as a "nebulous standard" which has been "rejected by most Courts as a sole basis for disqualification"); *Golias v. King,* 1995 W.L. 517222 (Tex. App. — Beaumont 1995, no writ) ("appearance of impropriety was eliminated from the new Disciplinary Rules of Professional Conduct because of vagueness."); *Halligan v. Blue Cross and Blue Shield of North Dakota,* 1994 W.L. 497618 (N.D. 1994) (court rejects, as have other courts, "vague standard of an appearance of impropriety as a basis for requiring withdrawal.")

We question whether a standard that has been rejected as a basis for disciplining lawyers should continue to be used

to discipline judges.[1] We are not alone. Last year a United States District Court in New York, in *Spargo v. New York State Commission on Judicial Conduct*, 2003 W.L. 2002762 (N.D.N.Y.), stayed the New York State Judicial Conduct Commission from enforcing certain portions of the Judicial Code pending appeal. Although the Second Circuit eventually reversed its underlying ruling on federal abstention grounds, the District Court's reasoning is very instructive. The District Court held that while the AOI Requirement had been invoked many times in imposing judicial discipline, none of those cases specifically had upheld the constitutional validity of the phrase "appearance of impropriety." As the Court noted, the numerous reported decisions from New York assumed that the AOI Requirement was valid and applied it to a stated set of facts. Perhaps more significantly, the *Spargo* court considered it a "particularly apt comment" that the AOI standard is "very subjective" and is a concept "beset by legal and moral complexity." The court also favorably noted the following language:

> "The lack of specificity as to what conduct makes a Judge vulnerable to a charge of appearance of impropriety may bear serious due process implications."

---

1. While judicial disciplinary prosecutors and administrative judges may be comfortable with the AOI Requirement, this hardly supports its continued use. We know of few, if any, defense counsel who make their living defending judges alone; most also defend lawyers. To have two closely related disciplinary systems, one utilizing the AOI Requirement and the other treating it as anathema, makes little sense.

These comments were neither new nor unique. As long ago as 1969, former United States Supreme Court Justice Arthur Goldberg, echoing the sentiments of former Justice (and former Attorney General) Tom Clark as well as several law professors, characterized Canon 2 as "unbelievably ambiguous," and stated that "to avoid the appearance of impropriety, it helps both the public and the judge to know the guidelines." He went on to say: "Our judges are men, not gods, and like all of us, they can benefit greatly from having some ground rules against which to measure their conduct ... particularly . . . in this area of avoiding even the appearance of impropriety." *Nonjudicial Activities of Supreme Court Justices:* Hearings on S 1097 and S 2109 Before the Subcommittee on Separation of Powers of the Senate Comm. On the Judiciary, 91st Cong., 1st Sess. [1969] at 159, 165, 175, 185. *See Matter of Larsen,* 616 A.2d 529, 580-81 (Pa. 1992) ("Propriety . . . is often in the eye of the beholder. . . . [D]isciplinary rules expressed in terms of 'propriety' risk mercurial existence rising and falling with the temper of the moment").

Moreover, in a scathing dissent in *Spector, supra,* former Associate Judge Jacob Fuchsberg of the New York Court of Appeals criticized disciplinary prosecutors' use of the AOI Requirement to sanction a judge for using the same method of making appointments as that prevailing throughout the State without committing any actual impropriety. Judge Fuchsberg stated:

> "[L]ack of specificity as to what conduct makes a judge vulnerable to a charge of appearance of impropriety may bear serious due process

> implications. Leaving the rules expected to be observed unidentified is bound to burden our Judges with uncertainty as to whether what is acceptable today will be deemed aberrant tomorrow." *Spector,* 47 N.Y.2d at 473, 418 N.Y.S.2d at 571.

A leading commentator, Professor Leslie Abramson, echoed these words just a few years ago in urging that the AOI Requirement not be "freely applied." Canon 2 Article at 955. Noting the "uncertainty" the Requirement creates for judges in all aspects of their lives, Professor Abramson expressed concern that "[p]utting men and women who have to judge the rights of others under such stress" would "undermine[] their self-worth." *Id.* at 955-56.

The experiences of APRL members throughout the country have made clear that these critiques are not just academic. Members report that disciplinary prosecutors and investigators, in order to put additional pressure on judge respondents, often tack on AOI charges in addition to their more specific claims. This maneuver often causes the judge respondents to settle, because even when they are confident they can defend against the specific charges, they remain fearful of the amorphous AOI count, an "I know it when I see it" standard that can easily be construed against them.

Their fears are well founded. When AOI claims are actually tried at hearings, the result is usually difficult to predict, since the test for AOI is so vague. "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability

to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Comment to Canon 2. While some have said this "reasonable person" standard is "one familiar to judges" [Gray at 4], that argument is misleading: the "reasonable person" standard is generally used to impose civil liability, not to take away someone's livelihood. Moreover, as Judge Easterbrook noted in *Matter of Mason,* 916 F.2d 384, 386 (7th Cir. 1990), the "objective" reasonable person standard "creates problems in implementation. Judges must imagine how a reasonable, well-informed observer of the judicial system would react. Yet the judge does not stand outside the system; as a dispenser rather than a recipient or observer of decisions, the judge understands how professional standards and the desire to preserve one's reputation often enforce the obligation to administer justice impartially, even when an observer might be suspicious."

In light of all of these concerns, we read with interest the ABA Commission's proposed Canon 1, which kept the AOI Requirement in the Canon itself, did not mention it in proposed Canon 1.01, and stated in Comment 2 that "ordinarily" a judge being disciplined under the AOI Requirement will also be disciplined under "some other specific rule under this or another canon." We view this proposal as an important first step in limiting the scope of the AOI Requirement. Nevertheless, it troubles us for two reasons. First, the reference to the AOI Requirement in Comment 2 but not in Canon 1.01 creates a drafting imbalance more likely to sow confusion than clarity. Second, and perhaps more significantly, many states have adopted only the Canons and not the Commentary; in those states,

the ABA Commission's proposal will achieve nothing. Canon 2 Article at 953 n.13 (listing states that did not adopt Commentary). Accordingly, at a minimum, the concept that the AOI Requirement may not serve as an independent basis for discipline should be moved to the body of the Code itself, either into the Preamble or into Canon 1.01.

Moreover, while we endorse the ABA Commission's approach, in proposed Canons 2.01 to 2.06, to make the disciplinary aspects of the Code more specific, we respectfully submit that even more exact language can be used to clarify the rules for the public and the judiciary while maintaining the basic principles underlying the AOI Requirement. We recommend the following amendments to some of the proposed Canons (our proposals are in italics):

> Canon 2.03: Competence in the Law *and Recognition of the Judge's Role in the Legal System:* A judge shall not:
>
> *(a) engage in conduct that is prejudicial to, interferes with, or obstructs the administration of justice; or*
>
> *(b) engage in conduct which involves, or appears to involve, repeated or flagrant disregard of established applicable law.*

Our proposed Canon 2.03(a) will more directly address cases in which judges aid fugitives or otherwise improperly prevent police officers or others from carrying out their functions against the judge's friends, family members, etc. The current

proposed Canon 2.03 risks sanctioning judges just for being wrong. Our proposed Canon 2.03(b) will more clearly delineate when judges may be sanctioned for making improper legal rulings. The "appears to involve" clause will address cases like *In re Best,* 719 So.2d 432 (Louisiana 1998), where a judge was sanctioned because he took a "straw poll" of the courtroom audience before determining whether a criminal defendant was guilty.

> *Canon 2.04: Impartiality and Fairness*: A Judge shall apply the law without regard to the judge's personal views and shall decide all cases with impartiality and fairness. *A judge shall avoid even the appearance of partiality, unfairness or favoritism.*
>
> *Canon 2.05*: A Judge shall perform judicial duties without bias or prejudice, *and without the appearance of bias or prejudice. A* Judge shall not, in the performance of judicial duties . . .

Our proposed language would address the AOI Requirement, to the extent it applies to these situations, far more exactly. In our view, the italicized clauses would address cases where no actual impropriety is found, but where the judge's conduct gives the appearance of bias or favoritism. *See, e.g., In the Matter of Johnstone,* 2 P.3d 1226 (Alaska 2000) (appearance of favoritism in hiring coroner who judge knew to be Chief Judge's friend); *In re Chaisson,* 549 So. 2d 259 (Louisiana 1989) (making inquiries on behalf of a litigant regarding settlement); *Kennick v. Commission on Judicial Performance,*

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787 P.2d 591 (California 1990) (meeting alone in Chambers with attorney for one of the parties).

Finally, there should be a proposed Canon 2.1 that states as follows:

> *Canon 2.1 Professional Misconduct.* It is professional misconduct for a judge to:
>
> (a) commit acts that would constitute a crime;
>
> (b) take action, in connection with the judge's official duties, that reflects adversely on the judge's honesty, integrity, impartiality, or trustworthiness, or raises a substantial question of the fitness of the judge to continue serving in a judicial capacity;
>
> (c) engage in conduct, whether or not in connection with the judge's official duties, involving dishonesty, fraud, deceit or misrepresentation;

APRL believes that this language would provide clearer notice to judges as to what conduct constitutes an ethical violation, and would more closely tie together the standards for judicial discipline with those for attorney discipline [*see, e.g.*, Model Rule 8.4], thereby resulting in more doctrinal consistency between the two bodies of disciplinary law.

Appendix A

Of course, many have defended the AOI Requirement because it forces judges to adhere to higher standards than ordinary citizens, and indeed than ordinary members of the Bar. We respond by once again quoting Judge Fuchsberg in his dissent in *Spector:*

> "Understandably, no Judge can respond with less than pride to the flattering proposition that more may be expected of Judges than of mere mortals. It would be regrettable in the extreme, however, if we were driven to prove this by stripping members of our judiciary of the right they share with all people to be judged fairly. And it would be unfortunate to mistake an unwillingness to accede to a denial of this right as a tolerance of judicial misconduct whenever it truly exists."

We would greatly appreciate the opportunity to discuss these proposals in more detail in at the public hearing to be held in connection with the ABA Convention in Atlanta, Georgia.

We will contact George Kuhlmann in the hope that we can arrange this.

Respectfully submitted,

Ronald C. Minkoff, Esq.
Chair, APRL Committee on
Model Code of Judicial Conduct

Ronald E. Mallen, Esq.
President, APRL

Appendix A

ABA Commission on the Model Code of Judicial Conduct June 30, 2004

cc: Members of APRL Board and Committee
Jeanne Gray, Esq.
Luke Bierman, Esq.
George Kuhlman, Esq.
Eileen Gallagher, Esq.
Marvin Karp, Esq.
Dudley Olden, Esq.

APPENDIX B — LETTER TO MARK I. HARRISON, ESQ. DATED OCTOBER 27, 2006

October 27, 2006

BY UPS AIR
Mark I. Harrison, Esq.
Osborn Maledon, P.A.
292 N. Central Ave.
Suite 2100
Phoenix, AZ 85012-2793

Re: Joint Commission to Evaluate the Model Code of Judicial Conduct

Dear Mark:

As I believe you know, the Standing Committee on Ethics and Professional Responsibility reviewed a recent draft of the revised Code of Judicial Conduct at its October 13-14 meeting. I understand that George Kuhlman has already passed along certain editorial suggestions that we believed would help clarify the text, and we hope that they will be taken into account to the extent the Joint Commission deems appropriate.

Subject to a review of the final submission to the House, the Standing Committee would like to be in a position to support the Joint Commission's anticipated Report and Recommendation to approve the revised Code of Judicial Conduct. We have one major concern, however, relating to Scope paragraph [2]. The Standing Committee does not believe that the Canons — particularly Canon 1, referring to the so-called "appearance of impropriety" — should *ever* be

the basis for the imposition of judicial discipline, whether standing alone or when charged in conjunction with a Rule. If that is made clear as the position of the Joint Commission, the Standing Committee is prepared to serve as a co-sponsor.

Please feel free to call me if you would like to discuss this further.

Yours very truly,

s/ Steven C. Krane
Steven C. Krane
Chair

APPENDIX C — LETTER TO MARK I. HARRISON DATED NOVEMBER 7, 2006

November 7, 2006

Mark I. Harrison
Chair, ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct
Osborn Maledon, P.A.
2929 N. Central Ave., Suite 2100
Phoenix, AZ 85012

Dear Mr. Harrison:

The ABA Standing Committee on Professional Discipline is pleased to submit its comments to the Joint Commission on Evaluation of the Model Code of Judicial Conduct's final draft of the Model Code. The Committee commends the Joint Commission for all its hard work.

The Committee's comments are based upon the October 11, 2006 draft of the Model Code. However, prior to the Committee's approval of these comments for submission to you, its counsel compared them to the text of October 31, 2006 draft to ensure that Committee's concerns had not already been addressed by the Commission.

The recommendations set forth in this letter are mostly substantive, but some are stylistic. The Committee has not yet voted as to whether to support or cosponsor the Joint Commission's filing with the ABA House of Delegates. It will do so after it reviews the version of the Code that is ultimately filed with the House. However, although the Discipline Committee hopes to be able to support or

cosponsor the Joint Commission's Report and Recommendation to the House of Delegates, it may decide not to do so if the Joint Commission does not address its concerns regarding the non-enforceability of the Canons. The position of the Discipline Committee has been consistent from the outset of this process—it believes that the text of the Canons is not enforceable and therefore not chargeable. The Canons are broad principles more in the nature of captions. Only the Rules should be enforceable and therefore chargeable. The Rules are specific and give fair notice of proscribed conduct.

The Discipline Committee appreciates the careful consideration given to this issue. However, it remains committed to its position that, from an enforcement perspective and consistent with other ABA models, only specific rules should be chargeable and form the basis for discipline. The Committee offers a suggestion in this regard in the attached redlined version of the October 31, 2006 draft.

The Discipline Committee's support or co-sponsorship may also depend upon the Joint Commission's response to concerns it previously raised regarding paragraph [6] of the Scope. As noted in my March 15, 2006 letter, the statement in paragraph [6] that "although the text of the Rules is binding and enforceable it is not contemplated that every violation with result in disciplinary action" is not accurate, nor is it consistent with descriptions in other ABA Model Rules about what happens when a lawyer or judge violates a rule of professional conduct. Specifically, paragraph [6] of the October 31, 2006 draft of the Scope is inconsistent with the comment to Rule 6 of the *ABA Model Rules for Judicial*

Appendix C

Disciplinary Enforcement and paragraph [19] of the Scope of the *ABA Model Rules of Professional Conduct.* If retained, the Committee believes that this language will be misconstrued by a public that is already skeptical of the judicial discipline process. The Committee believes that the ABA should be working to enhance the public's perception of the process and, therefore, again suggests alternate language for adoption by the Commission in the attached redlined version.

The Committee strongly recommends that the Joint Commission provide a Comment for each Rule in the document. For example, Rules 1.1 and 3.15 and Section IV of the Application do not have any commentary to provide guidance to those using the Code. The Committee also recommends the use of "gender" throughout the document, as set forth in my March 15, 2006 letter. Unless there is a legal reason to do so, the Joint Commission should not use both "sex" and "gender" when dealing with discrimination. See e.g., Rules 2.3, 3.6 and the Comment to Rule 3.1.

The following are explanations of the Discipline Committee's comments regarding specific provisions of the Joint Commission's draft.

A. Discipline Committee's Comments Regarding Joint Commission's Draft of the Preamble

The Discipline Committee's proposed changes to the Joint Commission's Final Draft of the Preamble, as set forth in the attached redlined draft, are intended to clarify that in order for the judiciary to be independent and impartial, it also must

be fair. Fairness and impartiality on the part of judges help assure the independence of the judiciary as a whole. The proposed addition to paragraph [3] is intended to clarify this.

B. Discipline Committee's Comments Regarding Joint Commission's Draft of the Scope

The Discipline Committee's proposed changes to the Joint Commission's Final Draft of the Scope are:

1. Intended to reflect the Committee's position that only the Rules, not the Canons, are enforceable. The Committee believes that deleting the phrase "for violating a Canon" front paragraph [2] accomplishes this goal. While individual jurisdictions may decide to take a different approach, the Committee believes that the ABA should, as it did with the *Model Rules of Professional Conduct,* take the leadership position that only alleged violations of the Rules should be investigated and charged so as to form the basis for the imposition of any discipline.

2. Intended to clarify paragraph [6] and ensure the Code's consistency with the *ABA Model Rules for Judicial Disciplinary Enforcement* and the *ABA Model Rules of Professional Conduct.* While the Model Code of Judicial Conduct is primarily intended for use by judges and judicial disciplinary agencies, it will stand as the ABA's policy on these issues. It should be drafted in a manner that enhances the public's trust in our judiciary and its discipline system.

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C. Discipline Committee's Comments Regarding Joint Commission's Draft of the Application Section

1. The Committee believes that the term "informed consent," contained in paragraph [1] of the Comment to Section III of the Application should be defined in the Terminology Section. The Committee believes this will be more useful to those using the Code than the bracketed reference to Rule 1.2 of *the ABA Model Rules of Professional Conduct* in the Comment.

2. Section IV of the Application should have a Comment.

D. Discipline Committee's Comments Regarding Joint Commission's Draft of Rules 1.1 through 1.3

1. Rule 1.1 should have a Comment.

2. The Committee believes that reordering paragraphs [1] through [3] of the Comment to Rule 1.2, as set forth in the attached redlined version better reflects the order of the Rule.

3. The Committee suggests changing "should" to "may" in paragraph [4] of the Comment to Rule 1.2. The Committee understands the aspirational nature of "should" in this instance, but believes "may" will prevent judges who validly choose to not participate in any extrajudicial activities of this nature from receiving unfair criticism.

Appendix C

E. Discipline Committee's Comments Regarding Joint Commission's Draft of Rules 2.1 through 2.16

1. The last sentence of paragraph [3] of the Comment to Rule 2.2 should be deleted. The black letter of the Rule requires a judge to uphold and apply the law. The Committee believes that advising that a judge's *intentional* disregard of the law may not be a rule violation conflicts with the purpose and intent of the black letter and is inappropriate.

2. "Swayed," as it appears in paragraph (A) of Rule 2.4 is not a defined term, and is not in the next paragraphs of the same Rule, which use the term "influence." From an enforcement perspective, this is problematic. The Discipline Committee believes that "swayed" should be replaced by "influenced" in the black letter of paragraph (A) of Rule 2.4. This would be also consistent with the language in the title of the Rule.

3. The Discipline Committee recommends deleting paragraph [5] of the Comment to Rule 2.5 as it is an observation that provides no useful guidance and is not appropriate for inclusion in a Code of this nature. Further the Committee has concerns that some of the language of that Comment may implicate the Americans With Disabilities Act incorrectly.

4. The Committee recommends that Rule 2.9 (D) should provide that a judge shall ensure that the Rule is not violated by court staff, officials and others under

the judge's supervision and control. This is consistent with the duties of a judge set forth in Rule 2.12(A).

5. The Discipline Committee recommends adding a sentence to paragraph [5] of the Comment to Rule 2.9 to explain that, when a judge consults with another judge about a pending matter, the judge who is consulted may be required to recuse himself or herself from that case in the future.

6. The Discipline Committee believes that the text of the Comment to Rule 2.10 should be enhanced to provide better guidance to those relying on the Code.

7. Consistent with "A Dictionary of Modem Legal Usage" by Brian A. Garner, the Committee recommends that Rule 2.11 be entitled "Recusal and Disqualification" and that the recommended changes set forth in the attached redline version be made.

F. Discipline Committee Comments Regarding Joint Commission's Draft of Rules 3.1 through 3.15

1. The Committee recommends adding "knowingly" to the black letter of Rule 3.5 and considering the deletion of "intentionally." "Knowingly" is a defined term in the Code. If the Commission contemplates that a judge can disclose or use nonpublic information acquired "knowingly," an explanation should be provided in the Comment.

Appendix C

2. The Discipline Committee recommends adding a paragraph to the Comment to Rule 3.10 referencing how the black letter is to apply to continuing and periodic part time judges, and referencing Sections III and IV of the Application Section.

3. The Committee believes that the Joint Commission should clarify statements in Rule 3.13 (B)(2) about a judge being able to, without public reporting, accept gifts, etc. from friends, relatives or *other persons* even if acceptance would require disqualification under Rule 2.11. The Committee understands the intent of the Rule with respect to gifts from friends and relatives, as explained in the Comment, but is concerned about application of this provision to "other persons."

G. Discipline Committee's Comments Regarding Joint Commission's Draft of Rules 4.1 through 4.5

1. The Committee suggests adding "fair" to Rule 4.1 (A)(15).

2. Consistent with the its recommendations regarding the non-enforceability of the Canons, the Committee suggests substituting "these Rules" for "Canon" in the Comment to Rule 4.1.

3. With respect to Rule 4.4, the Discipline Committee suggests that if it has not already done so, the Joint Commission explore what, if any, impact the provisions and reporting/disclosure requirements of Rule 4.4 and the judge's/judicial candidate's obligation to ensure

compliance with them might have vis a vis organizations organized under Section 527 of the Internal Revenue Code.

Thank you for this opportunity to comment on the draft revision of the Model Code of Judicial Conduct. If the Joint Commission has any questions regarding this submission please contact Regulation Counsel Mary M. Devlin at 312/988-5311 or *devlinm@staff.abanet.org* or Associate Regulation Counsel Ellyn S. Rosen at 312/988-5311 or *rosene@staff.abanet.org*.

Sincerely,

s/ Barbara K. Howe
Hon. Barbara K. Howe
Chair, ABA Standing Committee on
Professional Discipline

enclosures

cc: Standing Committee on Professional Discipline
Jeanne P. Gray
Mary M. Devlin
Ellyn S. Rosen
George A. Kuhlman
Eileen Libby
Marcia Kladder